IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, *et al.*,

Petitioners,

—v.—

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
10 Columbus Circle
New York, N. Y. 10019

J. LEVONNE CHAMBERS
ADAM STEIN
CHAMBERS, STEIN, FERGUSON & LANNING
216 West Tenth Street
Charlotte, N. C. 28202

C. O. PEARSON
203½ East Chapel Hill Street
Durham, N. C. 27702

Attorneys for Petitioners

INDEX

Table of Authorities

Cases:

PAGE

PAGE

Other Authorities:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, *et al.*,

Petitioners,

—v.—

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinions of the courts below are as follows:[1]

1. Opinion and order of April 23, 1969, reported at 300 F. Supp. 1358 (285a).
2. Order dated June 3, 1969, unreported (370a).
3. Order adding parties, June 3, 1969, unreported (374a).
4. Opinion order of June 20, 1969, reported at 300 F. Supp. 1381 (448a).

---

[1] Earlier proceedings in the same case are reported as *Swann* v. *Charlotte-Mecklenburg Board of Education*, 243 F. Supp. 667 (W.D. N.C. 1965), affirmed, 369 F.2d 29 (4th Cir. 1966).

5. Supplemental Findings of Fact, June 24, 1969, reported at 300 F. Supp. 1386 (459a).
6. Order dated August 15, 1969, reported at 306 F. Supp. 1291 (580a).
7. Order dated August 29, 1969, unreported (593a).
8. Order dated October 10, 1969, unreported (601a).
9. Order dated November 7, 1969, reported at 306 F. Supp. 1299 (655a).
10. Memorandum Opinion dated November 7, 1969, reported at 306 F. Supp. 1301 (657a).
11. Opinion and Order dated December 1, 1969, reported at 306 F. Supp. 1306 (698a).
12. Order dated December 2, 1969, unreported (717a).
13. Order dated February 5, 1970, reported at 311 F. Supp. 205 (819a).
14. Amendment, Correction, or Clarification of Order of February 5, 1970, dated March 3, 1970, unreported (921a).
15. Court of Appeals Order Granting Stay, dated March 5, 1970, unreported (922a).
16. Supplementary Findings of Fact dated March 21, 1970, unreported (1198a).
17. Supplemental Memorandum dated March 21, 1970, unreported (1221a).
18. Order dated March 25, 1970, unreported (1255a).
19. Further Findings of Fact on Matters raised by Motions of Defendants dated April 3, 1970, unreported (1259a).

20. The opinions of the Court of Appeals filed May 26, 1970, not yet reported, are as follows:

    a. Opinion for the Court by Judge Butzner (1262a).

    b. Opinion of Judge Sobeloff (joined by Judge Winter) concurring in part and dissenting in part (1279a).

    c. Opinion of Judge Bryan dissenting in part (1293a).

    d. Opinion of Judge Winter (joined by Judge Sobeloff) concurring in part and dissenting in part (1295a).

21. The judgment of the Court of Appeals appears at 1304a.

22. The opinion of a three-judge district court in an ancillary proceeding in this case dated April 29, 1970, not yet reported, appears at 1305a.

23. The Memorandum of Decision and Order dated August 3, 1970, unreported of the district court entered following the further proceedings directed by the Court of Appeals (1278a-1279a) and authorized by this Court (1320a) is appended to this brief.[2]

Jurisdiction

The judgment of the Court of Appeals was entered on May 26, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The petition for a writ of certiorari was filed in this Court on June 18, 1970, and was granted on June 29, 1970 (1320a).

---

[2] The appendix to the brief containing the decision on remand is herein designated "Br. A——." The other matters, including all other previous opinions are printed in separate appendix volumes and are herein designated "——a."

The Memorandum dated August 7, 1970, unreported is printed at Br. A39.

Questions Presented

1. Whether the trial judge correctly decided he was required to formulate a remedy that would actually integrate each of the all-black schools in the northwest quadrant of Charlotte immediately, where he found that government authorities had created black schools in black neighborhoods by promoting school segregation and housing segregation.

2. Whether, where a district court has made meticulous findings that a desegregation plan is practical, feasible and comparatively convenient, which are not found to be clearly erroneous, and the plan will concededly establish a unitary system, and no other acceptable plan has been formulated despite lengthy litigation, the Court of Appeals has discretion to set aside the plan on the general ground that it imposes too great a burden on the school board.

Constitutional Provisions Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement

1. *Introduction*

This Court has granted review[3] of an en banc[4] decision of the United States Court of Appeals for the Fourth Cir-

---

[3] The defendants have filed a cross petition for writ of certiorari which is pending. (Oct. Term 1970, No. 349.)

[4] Prior to argument, Judge Craven entered an order disqualifying himself. He had decided the case as a district judge in 1965 (243 F. Supp. 667) and was of the opinion that this previous participation barred him from hearing the case as a circuit judge. 28 U.S.C. §47.

cuit setting aside certain portions of an order of Judge James B. McMillan of the Western District of North Carolina which had required the complete desegregation of the Charlotte-Mecklenburg County public school system. Three members of the court, in a plurality opinion written by Judge Butzner, agreed with the lower court that the school board had an affirmative duty to employ a variety of available methods, including busing, to disestablish its dual school system and approved the portions of the order providing for the desegregation of the junior and senior high schools. As to the plan ordered for the elementary schools, however, they thought that the board "should not be required to undertake such extensive additional busing to discharge its obligation to create a unitary school system (1271a)." Judges Sobeloff and Winter viewed Judge McMillan's decision as appropriate in all respects and would have affirmed the decision in its entirety (1279a, 1295a). Judge Bryan who would have reversed the entire order expressed disapproval of busing to achieve racial balance which he found the order to require for junior and senior high school students as well as elementary (1293a).[5]

2. *Proceedings Below*

Black parents and students brought this action in 1965 against the local school board to desegregate the consolidated school district of Charlotte City and Mecklenburg County, North Carolina pursuant to 28 U.S.C. §1343 and 42 U.S.C. §1983. The North Carolina Teachers Association, a black professional organization, intervened seeking de-

[5] This is essentially the position of the defendants as stated in their cross petition for writ of certiorari. See note 3, supra. They not only argue that the Court of Appeals erred in approving Judge McMillan's plan for junior and senior high schools, but also disagree with the Court's conclusion that the board's elementary plan is unconstitutional.

segregation of the faculties on behalf of the black teachers in the school system. More recently, other defendants have been added, including the State Board of Education, the State Superintendent of Public Instruction and the individual members of the local board (464a, 374a, 901a). This current phase[6] of the litigation began in 1968 when the plaintiffs, relying upon the *Green* trilogy,[7] reopened the case seeking the elimination of all vestiges of the dual system (2a).

Judge McMillan first heard testimony in March, 1969 and entered his initial opinion the following month (300 F. Supp. 1358; 285a) judging the school system to be illegally segregated and requiring the board to submit a plan for desegregation. Extensive proceedings followed over the

---

[6] The case was first tried in the summer 1965. (243 F. Supp. 667 (1965).) The plaintiffs challenged an assignment plan where initial assignments were made pursuant to geographic zones from which students could transfer to schools of their choice. Plaintiffs complained that many of the zones were gerrymandered and that the zones of ten rural and concededly inferior black schools which the board claimed would be abandoned within a year or two overlapped white school zones. They also attacked a free transfer policy which had resulted in the transfer of each white child initially assigned to black schools as had the previous policy allowing for minority to majority transfers. Also under attack was the board's policy looking to the "eventual" non racial employment and assignment of teachers. Underlying plaintiffs' specific grievances was their general assertion that the Constitution required the school board to take active affirmative steps to integrate the schools.

The district court approved the assignment plan but required "immediate" non-racial faculty practices.

The court of appeals affirmed. (369 F.2d 29 (1966).) The decision noted that the 10 black schools were closed at the end of the 1965-66 school year. The court held, as it did the following year in *Bowman* v. *The School Board of Charles City County*, 382 F.2d 326 (1967), rev'd sub nom. *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), that the school board had no affirmative duty to disestablish the dual system.

[7] *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968); and *Raney* v. *Board of Education*, 391 U.S. 443 (1968).

next twelve months.[8] He rejected the first plan submitted and called for another, found the second plan inadequate but "reluctantly" accepted it as an interim measure for the 1969-70 school year, again required a new plan which after review was also found unacceptable.[9] On December 1, 1969, following the court's patient but unavailing efforts to secure from the board an acceptable plan, the failure of the board to carry out its minimal interim plan for 1969-70 and the mandate of this Court[10] that schools are to be desegregated "at once", Judge McMillan decided to appoint an educational consultant to assist him in devising a desegregation plan (698a). The following day, the court appointed Dr. John A. Finger, Jr., a Professor of

---

[8] Judge McMillan has provided an excellent summary of the proceedings in the district court prior to the decision of the court of appeals in his Supplemental Memorandum of March 21, 1970 (1221a).

[9] The first plan was rejected on June 20, 1969 (448a). The Court found that the board had sought from the staff a "minimal" and inadequate plan, that the staff produced such a plan and the board thereupon eliminated its only effective provisions before submitting it to the court.

The court found the second plan inadequate on August 15, 1969 (580a) but accepted it for the 1969-70 school year only because it promised some measure of desegregation and there did not appear to be sufficient time prior to the opening of the new school term for the development and implementation of a more effective plan. The failure of the board to accomplish what the plan had promised was determined on November 7, 1969 (657a).

The third "plan" was simply a statement of guidelines as to how the board intended to produce a plan. The guidelines promised no particular results and were thus rejected on December 1, 1970 (698a).

Judge Sobeloff traces this history in an extensive footnote (1291a, n. 9). He concludes "[T]he above recital of events demonstrates beyond doubt that this Board, through a majority of its members, far from making 'every reasonable effort' to fulfill its constitutional obligation, has resisted and delayed desegregation at every turn."

[10] *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19.

Education at Rhode Island College who was directed to work with the administrative staff to prepare a plan for the court's consideration (717a). The board was again invited to submit another plan (698a).

On January 20, 1970, plaintiffs requested that Dr. Finger promptly present his plan so that the schools could be desegregated "at once" (718a).[11] The Finger plan (835a-839a) and a fourth board plan (726a) were filed with the court in early February. Judge McMillan held further hearings and entered an order on February 5 directing the desegregation of the students and teachers of the elementary schools by April 1, 1970, and of the junior and senior high schools by May 4, 1970 (819a).[12] The order was based upon the plans submitted by the board and Dr. Finger.

The school board appealed (904a) and sought a stay in the court of appeals. On March 5, 1970, the court of appeals

---

[11] Plaintiffs' request followed the controlling decisions of *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Dowell* v. *Board of Education of the Oklahoma City Public Schools*, 396 U.S. 269 (1969); *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970); and *Nesbit* v. *Statesville City Board of Education*, 418 F.2d 1040 (4th Cir. 1969).

This was not the first request by plaintiffs for immediate relief. In September of 1969 the plaintiffs' motion for a finding of contempt and for immediate desegregation (596a) had led to the court's finding in November that the board had not accomplished, during the 1969-70 school year, what it had been ordered to do (655a).

The plaintiffs were required to file a variety of other motions as well, such as motions for contempt (596a, 914a), objections to patently defective plans (e.g. 692a), a motion to enjoin school construction (324a), motions to vacate state court orders (see 925a), motions to add new defendants (840a, 906a) and motions to enjoin state officials from interfering with orders of the court (840a, 906a, 914a). Despite these and other efforts in the district court, the court of appeals and this Court, there has yet to be any more desegregation in the Charlotte-Mecklenburg school system than when this round of litigation commenced.

[12] The order was slightly modified on March 3, 1970 (921a).

stayed a portion of the order relating to the elementary schools and directed that the district court make additional findings concerning the cost and extent of the bussing required by the February 5 Order (922a). The plaintiffs applied to this Court to have the partial stay rescinded; the application was denied.

The district court received additional evidence pursuant to the directives of the court of appeals and entered a supplemental Memorandum (1221a) and Supplemental Findings of Fact (1198a)[13] on March 21, 1970.[14]

---

[13] The supplemental findings were amended in certain respects on April 3, 1970 (1259a), in response to a motion by defendants (1239a).

[14] During this period there were also proceedings concerning the North Carolina anti-bussing law:

> "In June of 1969, pursuant to the hue and cry which had been raised about 'bussing,' Mecklenburg representatives in the General Assembly of North Carolina sought and procured passage of the so-called 'anti-bussing' statute, N.C.G.S. 115-176.1 [supp. 1969]" (1223a).

Plaintiffs were granted leave to file a supplemental complaint in July, 1969 and to add the State Board of Education and State Superintendent of Public Instruction as defendants to attack the statute (464a). At that time the statute did not appear to the court to be a barrier to school desegregation (579a, 585a).

However, in the spring of 1970, the Governor and other state officials directed that no public funds be expended for the transportation of students pursuant to the district court order of February 5 and several state judges issued *ex parte* orders of similar effect acting under color of the state statute. (See 1305a, 1307a, 1308a).

At the plaintiff's request Judge McMillan added the Governor, other state officials and one group of state court plaintiffs as defendants (901a). He, thereafter determined that the constitutionality of the state statute was at issue and, therefore, requested and the Chief Circuit Judge appointed a three-judge court. The court convened in Charlotte on March 24. On April 29, 1970, the court entered its decision (1305a) declaring unconstitutional the portions of the statute prohibiting the assignment of any students "on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national

The opinions and judgment of the court of appeals were filed on May 26, 1970. The court decided by a vote of 4 to 2 to vacate and remand the judgment of the district court for further proceedings. A majority for the judgment was created by the vote of Judge Bryan joining with the three members of the court subscribing to the plurality opinion written by Judge Butzner, although Judge Bryan dissented from the views expressed in the plurality opinion (1304a).[15]

3. *Proceedings Pending Certiorari*

Judge McMillan conducted hearings from July 15 through July 24, 1970 in accordance with the order of this Court of June 29, 1970 granting certiorari, authorizing the remand directed by the Court of Appeals for further proceedings and reinstating the district court's judgment.

The school board had filed, but did not support, a plan prepared by the Department of Health, Education and Welfare (hereinafter HEW) and a plan prepared by four of the five members of the school board.

The Department of Justice appeared at the hearing as *amicus curiae* to present the HEW plan. Testimony was therefore directed to the comparative advantages and disadvantages to these plans and another plan which had been prepared by Dr. Finger during his tenure as court consultant.

---

origins," the "involuntary bussing of students in contravention of [the statute]" and the use of "public funds . . . for any such bussing."

The state and the local defendants have noted appeals to this Court.

[15] The judgment was vacated in its entirety. Judge Butzner's reason for this action was to give greater flexibility to the development of a new elementary plan (1263a). Judges Winter and Sobeloff thought it was improper to invite the reconsideration of the portions of the plan already found acceptable (1295a, n.*). The judgment expressed Judge Bryan's hope that "upon re-examination the District Court will find it unnecessary to contravene the principle stated . . ." in his dissent (1304a).

The Court entered a Memorandum of Opinion and Order (Br. A1) on August 3, 1970 in which it: rejected again the majority board plan; rejected the HEW plan as unconstitutional, and unreasonable in the context of Charlotte; accepted as constitutional and reasonable the originally ordered plan, the minority board plan and the preliminary Finger plan; and continued in effect his previous order of February 5, 1970 but allowing the board to choose to operate under one of the other plans found acceptable by the court if such a decision were made and presented to the court in writing before noon on August 7, 1970.[16]

The school board, at a meeting on August 6, 1970 decided not to exercise any of the options offered by the order of August 3 and to appeal and seek a stay in this Court and in the court of appeals (Br. A40). Upon receiving the report the court ordered the court ordered plan of February 5 be implemented (Br. A39).

4. *The Charlotte-Mecklenburg County School System in 1968-69*

In March of 1969, the plaintiffs presented to the district court detailed evidence about the school system, such as the number and location of the schools, the grades served, the kinds of programs offered, the achievement of the students in the different schools, the racial distribution of students and faculties in the system, and the changes which had occurred over the years. The plaintiffs also showed by expert testimony the rigid racial segregation of the population in Charlotte and in Mecklenburg County and its causes.[17]

---

[16] The court also allowed the board to close rather than integrate the Double Oaks School (black). There had been evidence presented at the hearing that it is difficult to get buses to the school although buses served the school during the 1969-70 school year.

[17] See the testimony of Charles L. Green (15a-27a), Daniel O. Henningan (28a-57a), Paul R. Leonard (57a-64a) and Yale Rabin (174a-241a). And see the testimony of defendants' witness, William E. McIntyre (251a-284a).

The court carefully analyzed the voluminous evidence before it. Over the course of the litigation below, the district court made extensive findings of fact.[18] Each succeeding order reflects a comprehensive analysis of new submissions of evidence by the parties and the cumulative evidence already before the court. The court of appeals has accepted the district court's findings (1262a).[19]

Judge McMillan's first opinion on April 23, 1969, gave a detailed description of the school system, the community which it serves and the extent of racial segregation within the schools (285a). We only summarize here some of the salient facts contained in the April opinion.

The Charlotte-Mecklenburg school system serves more than 84,000 pupils residing in the city of Charlotte and Mecklenburg County. In April, 1969, there were 107 schools, including 76 elementary schools (grades 1-6), 20 junior high schools (grades 7-9) and 11 senior high schools (grades 10-12). The system employed approximately 4,000 teachers and nearly 2,000 other employees. The racial composition of the students in the system was approximately 71% white and 29% black. The residential patterns of the county were sufficiently integrated so that most of the county school zones included both black and white students. No all-black schools remained in the County. In the City, however, the

---

[18] Significant findings are contained in eight of the orders leading to the decision of the court of appeals: Opinion and Order, April 23, 1969 (285a); Opinion and Order, June 20, 1969 (448a); Order, June 24, 1969 (459a); Order, August 15, 1969 (579a); Memorandum Opinion, November 7, 1969 (657a); Opinion and Order, December 1, 1969 (698a); Order, February 5, 1970 (819a); Supplemental Findings of Fact, March 21, 1970 (1198a); and Further Findings, etc. (1259a).

See also the most recent Memorandum of Opinion and Order, August 3, 1970 (Br. A1).

[19] The most recent findings (Br. A1), of course, have not been reviewed by the court of appeals.

residential areas were and are generally segregated by race,[10] and most schools were racially identifiable.

During the 1968-69 school year, students were assigned to the schools under the same plan as approved by the district court in 1965—initial assignments by geographic zones with freedom of transfer restricted only by school capacities.

The court found that 14,000 of the 24,000 black students in the system were attending schools which were at least 99% black (303a).[11] The court further found that most of the desegregated city schools were in transition from a previously all-white enrollment to all-black (302a). Seven schools which served 5,502 white pupils and no black pupils in 1954, served 5,010 pupils of which 35% were black in 1965. In 1968 they served 5,757 students, 81% of whom were black.

The school system had been growing at approximately 3,000 students per year, requiring an on-going school construction program. With few exceptions, the size and place-

---

[10] Most of the evidence concerning residential segregation was produced at the March 1969 hearings. (See note 17, *supra*.) The April order describes the housing patterns and some of the forces which created them. The matter was examined again in subsequent orders, particularly the Order of November 7, 1969 (657a). The court's conclusion was that housing segregation in Charlotte has been substantially determined by governmental action.

[11] In June, after further analysis of the data, the court concluded that approximately 21,000 of the 24,000 black students in the system lived within the city of Charlotte and that nearly 17,000 of them were attending black or nearly all-black schools (459a). The court also found that nearly 19,000 of the more than 31,000 white elementary students attended schools which were nearly all-white. (There are only 150 black students attending these schools.) More than one-half of the 14,741 white junior high school students attended schools with a total black population of 193 (453a).

ment of the recently constructed schools produced either all-white or all-black new schools.[22]

The court found faculties segregated. The great majority of the 900 black teachers were teaching in black schools. There was less than one white teacher per black elementary school. The two black high schools had teaching staffs more than 90% black.

The court concluded that the board's policies of zoning, free transfer and its school placement had contributed to and continued an unlawfully segregated public school system. It also concluded that the faculties had not been desegregated as required by the 1965 order. The board was directed to produce plans for the active desegregation of the pupils and faculties by May 15, 1969.

On appeal, Judge Butzner agreed that the system was unlawfully segregated in April of 1969:

> "Notwithstanding our 1965 approval of the school board's plan, the district court properly held that the board was operating a dual system of schools in the light of subsequent decisions of the Supreme Court . . ." (1263a-1264a).[23]

The district court further found that the impact of segregation on black students in the system had resulted in the denial of equal educational opportunities. Comparative test results showed a wide disparity in achievement between students attending all-black schools and students attending

---

[22] The new black schools were generally "walk-in" schools while the white schools were placed some distance from the areas which they serve (1203a-1204a).

[23] Both Judges Sobeloff and Winter concurred in this conclusion (1279a, 1295a).

white and integrated schools (857a-859a, 702a-704a, 1206a-1207a).[24]

The court also found that the residential segregation was far from benign or de facto. The school board by gerrymandering zone lines (455a-456a) and other practices, together with the activities of other governmental agencies, had had a significant impact upon the creation of Charlotte's ghetto. Again, the three circuit judges subscribing to the plurality opinion and Judges Sobeloff and Winter concurred in these findings. As Judge Butzner summarized:

> The district judge also found that residential patterns leading to segregation in the schools resulted in part from federal, state and local governmental action. These findings are supported by the evidence and we accept them under familiar principles of appellate review. The district judge pointed out that black residences are concentrated in the northwest quadrant of Charlotte as a result of both public and private action. North Carolina courts, in common with many courts elsewhere, enforced racial restrictive covenants on real property [footnote omitted] until *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) prohibited this discriminatory practice. Presently the city zoning ordinances differentiate between black and white residential areas. Zones for black areas permit dense occupancy, while most white areas are zoned for restricted land usage.
>
> The district judge also found that urban renewal projects, supported by heavy federal financing and the active participation of local government, contributed to the city's racially segregated housing patterns. The school board, for its part, located schools in black residential areas and fixed the size of the schools to accom-

[24] The court reviewed the most recent data in July, 1970 and found wide disparities again (Br. A1).

modate the needs of immediate neighborhoods. Predominantly black schools were the inevitable result (1264a).

In addition to the activities of the governmental agencies producing the discriminatory zoning (297a, 1229a) and the urban renewal programs (297a, 1229a) mentioned by Judge Butzner, there was substantial evidence showing that long range planning by the City Council projects present segregation into the future (1229a), that public housing officials had overtly discriminated until recent years and have reinforced racial segregation by their site selection (1229a) and that those officials responsible for planning and building streets and highways have created racial barriers. (See, generally testimony of Yale Rabin (174a-241a)).

There was also significant testimony concerning "private" individual and institutional forces which have kept blacks out of white residential areas. The Rev. Daniel O. Hennigan, a black realtor testified at length concerning the enormous difficulties he had experienced over a period of four years in becoming the first—and so far only—black member on the Charlotte Board of Realtors. He finally secured membership by agreeing not to seek participation in Charlotte's multiple listing service. He also told of instances where he had negotiated the purchase of land in white areas but was unable to proceed because funds were denied his clients by the lending institutions (28a-57a).

5. *The Schools in 1969-70*

During the 1969-70 school year the schools were again operated under the board's 1965 desegregation plan as modified in its submission to the court in July 1969. The modifications provided for the transportation of 4,245 inner-city black students to outlying white schools. Of these

children 3,000 were to come from 7 schools which were to be closed and 1,245 from overcrowded black schools. The board also proposed some further faculty desegregation but would retain all other racially discriminatory features as found by the court in April. The board did propose, however, to study its building programs and such measures as altering attendance lines, pairing, clustering and other techniques in order to develop a comprehensive desegregation plan for the future.

The plaintiffs had objected to the proposal on the grounds that it left many schools segregated for yet another year and placed the full burden of desegregation upon black children.

The court, in an order entered on August 15, 1969 (579a), approved the proposed pupil reassignments for the 1969-70 school year "only (1) with great reluctance, (2) as a one year temporary arrangement and (3) with the distinct reservation that 'one-way bussing' plans for the years after 1969-70 will not be acceptable." The board was ordered to file a third plan by November 17, 1969, "making full use of zoning, pairing, grouping, clustering, transportation and other techniques . . . having in mind as its goal for 1970-71 the complete desegregation of the entire system to the maximum extent possible" (591a).[25]

Upon application of defendants, the court modified the August 15 order on August 29 to allow for the reopening of a black inner-city school to serve up to 600 inner-city children who chose not to be transported to suburban white schools (593a).

---

[25] The board explicitly refused to follow these directives. Each of the next two plans submitted by the board rejected the techniques of "pairing, grouping [and] clustering." See n. 29, *infra*. A similar directive of the court of appeals has also been ignored (Br. A1).

The plan did not accomplish what was promised. The court later found that "the 'performance gap' is wide" (659a).

> In substance, the plan which was supposed to bring 4,245 children into a desegregated situation had been handled or allowed to dissipate itself in such a way that only about one-fourth of the promised transfers were made; and as of now [March 21, 1970] only 767 black children are actually being transported to suburban white schools instead of the 4,245 advertised when the plan was proposed by the board (1226a).

In the November, 1969 Memorandum Opinion (657a) the court set out in detail the racial characteristics of the school system during the 1969-70 school year (658a-663a). The court concluded that there had been no real improvement from the segregated situation found during the previous school year.

> Of the 24,714 Negroes in the schools, something above 8,500 are attending "white" or schools not readily identifiable by race. More than 16,000, however, are obviously still in all-black or predominantly black schools. The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decision. The black school problem has not been solved.
>
> The schools are still in major part segregated or "dual" rather than desegregated or "unitary" (661a).

Analyzing the same figures in a later order (698a) the court pointed out that "Nine-tenths of the faculties are still obviously 'black' or 'white.' Over 45,000 of the 59,000 white students still attend schools which are obviously white" (702a).

The court also determined that the free transfer provision in the board's plan negated any progress which the

July plan might have produced (662a).[26] It also found that attempts to desegregate the schools by altering attendance lines would continue to fail as long as students could exercise a freedom of choice (662a-663a).

The court of appeals shared Judge McMillan's view that the system was still segregated during the 1969-70 school year (1266a, 1275a).

6. *The Plan Ordered by the District Court in Feburary, 1970*[27]

In the decision of December 1, 1969 (698a) in which the court announced that an educational consultant would be appointed, 19 principles were stated for his guidance (708a-713a). Dr. Finger's instructions included "all the black and predominantly black schools in the system are illegally segregated . . ." (711a); "efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but . . . variations from that norm

---

[26] The court had made similar findings in June:

> Freedom of transfer increases rather than decreases segregation. The School Superintendent testified that there would be, net, more than 1,200 additional white students going to predominantly black schools if freedom of transfer were abolished (453a).

Moreover, during the choice period prior to the 1969-70 school year, just two white students out of 59,000 elected to transfer to black schools and only 330 black students out of 24,000 chose to transfer to white schools (*Id.*).

[27] A portion of the February order was stayed by the court of appeals on March 5 (922a) and the remainder by the district court on March 25 (1255a).

The order was reinstated by this Court on June 29 (1320a) pending further proceedings in the district court.

On August 3, 1970 the district court continued this Court's order in effect subject to options made available to the board for elementary school assignments if exercised on or before August 7, 1970 (Br. A1). Since the board declined to exercise any of the options, the court, on August 7, 1970 directed the court ordered plan of February 5 be implemented (Br. A39).

may be unavoidable" (710a); "bus transportation to eliminate segregation [and the] results of discrimination may validly be employed" (710a); and "pairing, grouping, clustering, and perhaps other methods may and will be considered and used if necessary to desegregate the schools" (712a).

Dr. Finger's work is described in the Supplemental Memorandum of March 21, 1970 (1221a):

> Dr. Finger worked with the school board staff members over a period of two months. He drafted several different plans.[28] When it became apparent that he could produce and would produce a plan which would meet the requirements outlined in the court's order of December 1, 1969, the school staff members prepared a school board plan which would be subject to the limitations the board had described in its November 17, 1969 report.[29] The result was the production of two plans—the board plan and the plan of the consultant, Dr. Finger.
>
> The detailed work on both final plans was done by the school board staff (1231a).

Both plans were presented to the court.[30]

a. *High Schools*—The school staff had developed a plan which produced a white majority of at least 64% in each

---

[28] One of his preliminary plans was introduced and described at the July, 1970 hearing (Br. A1).

[29] The board's two most significant limiting factors were: (1) Rezoning was the only method to be employed; the board rejected such techniques as pairing, grouping and clustering; (2) a school sought to be desegregated would be at least 60% white; thus, the board's plan for elementary schools produced some schools between 57% and 70% white, eight schools 1% to 17% white, two schools 0% white and no schools between 18% and 58% white.

The court of appeals found as the district court had that these limiting factors were improper (1275a-1276a).

[30] Description of the plans are found in several of the decisions below. See, Order, February 5, 1970 (819a, 825a-827a) and tables

of the ten high schools including the all-black West Charlotte High School (see Exhibit B, 829a). The board accomplished this result by restructuring attendance lines. Dr. Finger's proposal used the board's new zones and assigned an additional 300 pupils from a black residential area to Independence High School which would have had only 23 black students under the board's plan. Judge McMillan adopted the Finger modification. This portion of the plan was approved on appeal. Judge Butzner wrote:

> The transportation of 300 high school students from the black residential area to suburban Independence School will tend to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent "tipping" or resegregation of other schools (1273a).

b. *Junior High Schools*—During the 1969-70 school year the board operated 19 junior high schools. Five were all or predominantly black; eight were more than 90% white. (See Exhibit D, 830a.) The board, by rezoning eliminated several of the black schools. One school, however, Piedmont, remained 90% black. Additionally, four schools would be more than 90% white.[11]

Dr. Finger devised a plan which would integrate all the junior high schools. Twenty of the schools would have white populations ranging from 67% to 79% and the re-

---

(829a-839a); Supplemental Findings, March 21, 1970 (1198a, 1208a-1214a); Supplemental Memorandum, March 21, 1970 (1221a, 1231a-1234a); Opinion of Court of Appeals (1262a, 1268a-1269a). See also the Memorandum of Opinion and Order, August 3, 1970 (Br. A1).

[11] Two new junior high schools are scheduled to open for the 1970-71 school year. Both proposed plans contemplate assigning students to these new schools. It is significant that under the board plan one of the schools would be 100% white and the other 91% white (830a).

maining school would be 91% white. The plan employed rezoning and satellite zones.[32]

The district court approved of the board's plan except as to Piedmont, and gave the board four options: (1) rezoning to eliminate the racial identity of the remaining black school, (2) two-way transportation of pupils between Piedmont and white schools, (3) closing Piedmont, or (4) adopting the Finger Plan. The board reluctantly chose to employ the Finger Plan.

Judge Butzner found the plans for junior and senior high schools by use of satellite zones together with transportation "a reasonable way of eliminating all segregation in these schools" (1273a).

c. *Elementary Schools*—The board in restructuring attendance lines for the 76 elementary schools was unable to affect a majority of the students attending racially identifiable schools. As the court of appeals observed, "Its proposal left more than half the black elementary pupils in nine schools that remained 86% to 100% black, and assigned about half of the white elementary pupils to schools that are 86% to 100% white" (1269a; see Exhibit H, 832a-834a).

The Finger Plan also employed the board's rezoning. 27 schools were rezoned, and 34 schools were desegreated by clustering and pairing with transportation.[33] Judge McMillan described the plan:

> Like the board plan, the Finger plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary schools by the technique of grouping two or three outlying schools with one black

[32] A "satellite zone" is an area which is not contiguous with the main attendance zone surrounding the school.

[33] The designated clusters are shown in Exhibit K (838a-839a). The zones of ten schools remained substantially unchanged.

inner city school; by transporting black students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school.

The "Finger Plan" itself . . . was prepared by the school staff. . . . It represents the combined thought of Dr. Finger and the school administrative staff as to a valid method for promptly desegregating the elementary schools. . . ." (1212a-1213a)

Under the plan the elementary schools would be from 60% to 97% white with most of the schools about 70% white. (See Exhibit J, 835a-837a.)

Judge McMillan found the board plan to be inadequate and directed that the Finger Plan or some other plan which would accomplish similar results be implemented.

The court of appeals agreed that the board plan was unacceptable. "The district court properly disapproved the school board's elementary school proposal because it left about one-half of both black and white elementary pupils in schools that were nearly completely segregated" (1275a). The court of appeals, however, decided that the board should not be required to undertake the additional transportation necessitated by the Finger Plan (1275a) and directed further proceedings for the development of another plan (1277a).

d. *Transportation*—The district court's order required additional transportation to be provided. The plurality opinion approved of the increments of transportation to accomplish the junior and senior high assignments (1273a) but determined that the elementary school busing appeared too extensive (1276a).

During the 1969-70 school year, the board operated 280 school buses transporting 24,737 of its 84,000 students.[34]

[34] Judge McMillan made detailed and elaborate findings concerning the extent and cost of busing in the Charlotte system, the state

The board reported (619a) the number of children transported, by grade level, as follows:

Pre-school	599
Elementary	10,441
Junior High	8,989
Senior High	4,708

Another 5,000 students rode public transportation at a reduced fare (1214a). The average annual cost per child was about $20.00 or about $475,000.00 out of a total budget of about 57 million dollars, almost all of which was reimbursed by the state.[35] The buses averaged 1.8 one-way trips

---

and the country, in his Supplemental Findings of March 21, 1970 (1198a). (See also Further Findings, etc. of April 3, 1970 (1259a)). The court had examined the transportation system in previous decisions as well (306a-307a, 449a-450a, 822a-823a).

Similar evidence was presented at the July, 1970 hearing with resulting findings by the court (Br. A1). These additional findings are discussed below.

[35] See Further Findings, etc., April 3, 1970 (1359a-1260a). The district court had originally understood the average cost to be about $40.00 per pupil (306a-307a, 1200a). The state reimburses local school boards for operating expenses for transportation for those students who are eligible under state law. The original cost of the bus is borne by the local board but the state replaces worn out buses (1259a-1260a).

During 1969-70 and previous years, pupils eligible for transportation were those children who lived more than 1½ miles from school and who lived either in the county or in portions of the city which had been annexed since 1957. Additionally, the state paid the transportation costs for children who lived within the pre-1957 city limits who attended schools outside of the pre-1957 limits (1203a).

For the 1970-71 school year, as a result of a decision in an unrelated case, *Sparrow* v. *Gill*, 304 F. Supp. 86 (M.D. N.C. 1969) (3-judge court), the State Board of Education has directed each school system either to offer transportation (at state rather than local expense) to *all* city children living more than 1½ miles from the school to which they are assigned or to *no* children living within the city limits.

Thus all of the children to be bused under the court approved plan would be eligible for transportation at state, rather than local expense. (See, Br. A1).

per day carrying an average of 83.2 students, averaging 40.8 miles (1200a).[36]

Judge McMillan's Findings in March (which were reaffirmed after 8 days of hearings in July, 1970) as accepted by the court of appeals show the added transportation under the plan ordered on February 5 to be:

	No. of Pupils	*No. of Buses*	*Operating*[37] *Costs*
Senior High	1,500	20	$ 30,000
Junior High	2,500	28	50,000
Elementary	9,300	90	186,000
Total	13,00	138	$266,000

The initial one-time[38] capital outlay to purchase new buses would be $745.200.[39] However, it was discovered at

---

[36] The overall figures for the state show a higher percentage of students riding buses than in Charlotte. During the 1968-69 school year about 55% of all students in North Carolina rode buses to school; 70.9% were elementary students (1199a). (Elementary students are defined by the state for these purposes as students in grades 1 through 8.)

[37] These operating cost figures are as determined by the court of appeals (1269a) by applying the district court's Further Findings, etc. of April 3, 1970 (1259a) to its Supplemental Findings of March 21, 1970 (1198a). Operating costs are reimbursed by the state.

The board had claimed much greater increases in the extent and cost of additional busing, but the district court, after carefully analyzing the data, found the board's figures to be exaggerated (see "Discount Factors," (1214a-1216a). The court's findings are also consistent with the transportation requirements projected by the board for its plan to transport 3,000 Negro children to the suburbs for the 1969-70 year (Exhibit E, 491a).

[38] Obsolete buses are replaced by the state. See note 35, *supra*.

[39] The district court observed that there was at least 3 million dollars worth of vacant school property which had been abandoned pursuant to the 1969-70 desegregation plan (1219a) and which, as the board had pointed out in its report in the summer of 1969, could be disposed of to produce necessary "desegregation" funds (Exhibit E, 491a).

the recent hearings that the board has on hand 107 buses not now being used to transport children to school.

14. Up until the July 15, 1970 hearings, the defendants had allowed the court to believe they only had 280 busses plus a few spares. On the last day of the hearing, however (July 24, 1970), some amazing testimony was developed on cross-examination of the witness J.W. Harrison, the Transportation Superintendent. He testified and the court finds as facts that *in addition to* the 280 "regular" busses, the Board's bus assets include at least the following:

(i)	Spare busses	20
(ii)	Activity busses (each driven less than 1,000 miles a year)	20
(iii)	Used busses replaced by new ones in 1969-70	30
(iv)	New busses currently scheduled for replacement purposes and expected to be delivered in near future	28
	Total:	107

(Br. A 18).

Moreover, the court found that since "early 1970 . . . there were 75 new busses available to the local school system if they wanted them, out of the 400 new busses then held by the state" and that the 400 second-hand busses in the state are "available on loan, without cost, for local school boards to use in 1970-71" that "could be safely used" (Br. A 1).

Thus no initial capital expenditures for busses is required of the local board.

"No capital outlay will be required this year to comply with the court's order. The School Board and the county government have ample surplus and other funds on hand to replace with new busses as many of the used busses as 1970-71 experience may show they actually need" (Br. A 1).

And, again, operating costs are borne by the state.

The board itself had proposed the busing of 4,200 black inner-city children for the 1969-70 school year to outlying suburban schools as a desegregation measure (584a-586a). The board's February 2 plan proposes to bus approximately 5,000 additional students, about half of whom are elementary pupils. A major portion of this busing is within the City (1217a, 1270a, n. 4). Moreover, there is nothing novel about city children riding school busses. Children living in the city but outside of the 1957 city limits have been bused. Many city boards of education, such as Greensboro, have provided transportation for all city children living more than 1½ miles from school with local funds. The present State Superintendent of Public Instruction, his predecessor and the prestigious 1969 Report of the Governor's Study Commission on the Public School System of North Carolina had all recommended that transportation be provided for children, city as well as rural, on an equal basis (1201a-1202). State policy for the 1970-71 school year is that all city children living more than 1½ miles from school will be eligible for transportation at state expense.

The bus trips required for the paired elementary schools would be straight-line non-stop trips (1205a), would be shorter and would take less time than the average bus trip in the sytem or in the state (1199a, 1205a).

34. . . .

(f) The average one-way bus trip in the system today is over 15 miles in length and takes nearly an hour and a quarter. The average length of the one-way trips required under the court approved plan for elementary students is less than seven miles, and would appear to require not over 35 minutes at the most, because no stops will be necessary between schools (1215a).[46]

Busing was a technique employed by the board to maintain its dual system as recently as 1966 (1200a); even today, school buses transport white students to outlying white schools while Negro students walk to their all-black schools (1203a-1204).

Judge McMillan's most recent memorandum includes significant findings concerning transportation. The exhaustive evidence on transportation presented in July verified beyond question the court's conclusions of March. It also revealed, even more clearly, the gross exaggerations of the Board's transportation estimates for all desegregation plans. Among the more pertinent findings are:

1. "In North Carolina the school bus has been used for half a century to transport children to *segregated consolidated schools*" (Br. A16).

2. The state now authorizes transportation at state expense for all city children living more than a mile

---

[46] The court later explained how these figures were developed:

The average *straight line* mileage between the elementary schools paired or grouped under the "cross-bussing" plan is approximately 5½ miles. The average bus trip mileage of about seven miles which was found in paragraph 34(f) was arrived at by the method which J. D. Morgan, the county school bus superintendent, testified he uses for such estimates —taking straight line mileage and adding 25%. (Emphasis in original; 1215a.)

and a half from school, causing a significant increase in the number of children riding school busses in North Carolina from the 55% who were bussed during the 1968-69 school year (Br. A16).

3. "School bus transportation is safer than any other form of transportation for school children" (Br. A16).

4. There were 17 busses carrying 700 four and five year old children to child development centers on one-way trips ranging from seven to thirty-nine miles during the 1969-70 school year (Br. A18, A24).

5. The Board's cost " 'estimates,' when heard against the actual facts, border on fantasy!" (Br. A24). Its projections do not, as claimed, reflect the Board's experience in transporting inner-city black children to outlying white schools for the 1969-70 school year.

> "[T]he evidence [shows] for example . . . that one [such] 'desegregation bus' (Bus #23, Exhibit 54) transported 99 children daily among schools as remote as Northwest Charlotte (9th and Bethune) on the one hand and Sharon Elementary and Beverly Woods Elementary on the other, with the driver then going on in the bus to South High School" (Br. A22).[41]

6. There is an emple supply of busses, new and used, money and drivers to implement the court order (Br. A18-A20, A26).[42]

---

[41] The defendants estimate for all plans are based upon the assumption that one bus will make one trip to one school with one load of 45 or less children (Br. A21-A22).

[42] The court also found to be without basis the Board's claim that: elementary children should not ride buses ("There may be more first graders than children of any other age riding school busses" (Br. A24)); that additional buses will unduly clog traffic in Charlotte (Br. A25); and that it would unduly disrupt the system if

7. *Other Elementary Plans Reviewed by the District Court in July, 1970*[42a]

Judge McMillan reviewed and compared five elementary plans at the hearings in July, 1970: (1) The majority board plan which he had rejected in February and which the court of appeals had rejected; (2) the Finger plan as ordered in February, 1970; (3) the minority board plan supported by four of the nine members of the board; (4) another plan which Dr. Finger had prepared when acting as court consultant; and (5) the HEW plan.

a. *The Majority Board Plan*—The court was of the opinion that the court of appeals had required the board to prepare and present another plan. The board chose not to do so, but relied again upon its February submission. Judge McMillan was not persuaded that he could approve a plan which left over half of the black and white elementary children in racially identifiable schools and which had been rejected by the court of appeals (Br. A27).

b. *The HEW Plan*—This plan was developed by a team of four HEW officials. They did not consult with or seek the assistance of the local staff in the preparation of the plan. The team was lead by Mr. Henry Kemp, recently hired by HEW, who had no previous experience as an educator with a school system of over 6,000-7,000 students. Charlotte was Mr. Kemp's first assignment by HEW to prepare a desegregation plan. His principal assistant was

---

it were necessary to stagger the hours of school to simplify transportation problems ("The schools already operate on staggered schedules. . . . The court finds that staggered opening and closing hours for elementary schools, and arrangement of class schedules of bus drivers for late arrival and early departure are facts of life which will not be eliminated by desegregation of the schools" (Br. A25-A26).)

[42a] At the time of the preparation of this brief, the July, 1970 proceedings have not yet been transcribed.

Mr. John Cross, a young lawyer who also had never worked upon a complete desegregation plan for a city or metropolitan school system.

The plan used the newly created zones of the majority board and Finger plans and then created several contiguous clusters each containing a black school with two or more rezoned desegregated schools with each school serving all the students within the cluster for 1, 2 or 3 grades. It left two schools all black.[43] The schools which had been desegregated by rezoning would therefore have a significantly greater black student population than under the Finger plan.

Both plaintiffs and defendants objected strenuously to the plan for substantially the same reasons. The Board's position on the HEW plan was unanimous.[44] The court described the HEW plan:

> 2. The HEW plan.—This plan proposes to adopt the basic zoning program of parts of the Board majority plan, and then to re-zone some of the black schools with some white schools, mostly in low and middle income areas, and by clustering, pairing, grouping and transportation, to produce a substantial de-

---

[43] One of these schools, Double Oaks, is in a *cul-de-sac* which was built to serve a segregated public housing project which surrounds it. Dr. Finger testified that if he were forced to decide which of the black children in Charlotte would be desegregated and which would not, he would seek initially to offer the children at Double Oaks a desegregated education.

[44] It was noted at the hearing that the Board's rejection of the HEW plan was the first unanimous action taken by the Board on a desegregation issue in a long time. Four members of the Board supported a minority plan at the July hearing which was designed to desegregate all the elementary schools so that each school would be approximately 70% white and 30% black; five supported the board plan of February which left 10 black or predominantly black schools.

segregation of the most of the black schools. The faults of the plan are obvious.

It leaves two schools (Double Oaks and Oaklawn) completely black; it leaves more than a score of other schools completely white; it would withdraw from numerous white schools the black students who were transported to those schools during the 1969-70 school year. The clusters proposed by HEW would for the most part continue to be thought of as "black" in this county because the school populations of most of the clusters would vary from 50% to 57% black and the lowest black percentage in any cluster is 36%. Recommended HEW faculty assignments to these clusters of schools contemplated faculties which in the main would be less than half white, and this would be another retrogression from the arrangements already made by the School Board for the fall term! Contrary to the orders of the district court and the Circuit Court, the HEW people limited their zoning to contiguous areas.

All witnesses except the HEW representatives themselves joined in hearty criticism of the HEW plan because of its ignorance of local problems, because of its threat of resegregation, and because it tends to concentrate upon the black and low- or middle-income community a race problem that is county wide.

In other days and other places the HEW plan would have looked good; and in those districts where black students are in the majority, much of such a plan could well be reasonable today. However, "reasonableness" has to be measured in the context; and in this context the HEW plan does not pass muster. It also on the facts of this case would fail to comply with the Constitution (Br. A28-A29).

c. *The Finger Plan, the Board Minority Plan and the Preliminary Finger Plan*—Judge McMillan found each of the three remaining plans to be basically acceptable, but found the original Finger plan to be the only finished plan.

> "The original court ordered (Finger) plan is the only complete plan before the court" (Br. A2).

The Minority plan created clusters of two or more elementary schools zones using the old (1969-70) attendance areas and included all elementary schools. Each cluster contains approximately 2,000 students with a white-black ratio in the neighborhood of 70%-30%. There is no method specified as to how the students would be assigned within the clusters, although the principal author of the plan, Dr. Carlton Watkins, testified that he favored some kind of random assignment plan which would produce the desired racial ratio at each school. He also favored having each school serve grades 1 through 6 rather than having altered grade structures as in the Finger plans where each school would serve either grades one through four or five and six.

In terms of the number of children to be transported and transportation costs the plans are not greatly different.[45]

> "All plans which desegregate all the schools will require transporting approximately the same number of children. The overall cost, if a zone pupil assignment method is adopted, the minority Board Plan may be a little cheaper than the Finger plan" (Br. A23).

---

[45] The HEW plan would require somewhat less busing at less cost because it leaves two schools all-black. If those schools were desegregated, however, the number of children to be bused would be about the same at a cost not significantly less than any of the other plans.

As to the preliminary Finger plan: "From the standpoint of economics it may be the cheapest plan available" (Br. A23).

Judge McMillan indicated the relative advantages and disadvantage, of these three plans. He judged each plan to be constitutional since each plan is feasible, reasonable and desegregates the schools. He, therefore, continued in effect the February 5 order, but allowed the Board to choose one of the other acceptable plans or some combination thereof on or before August 7, 1970. At a meeting on August 6, 1970, the board decided not to exercise any of these options (Br. A40). The court therefore ordered the February 5 plan to be implemented (Br. A39).

Summary of Argument

I

Both courts below held that the Charlotte-Mecklenburg school system was unconstitutionally racially segregated during the 1968-69 and 1969-70 school years. These holdings were clearly correct.

During the 1969-70 school year, the school board's desegregation plan which provided for the assignment of pupils by geographic attendance zones with pupils allowed a "free transfer" to other schools had resulted in: more than 16,000 of the 24,714 black pupils attending all-black or predominantly black schools; over 45,000 of the 59,000 white students attending schools which were obviously white; 16 schools were 98-100% black; 9 other schools were readily identifiable as black; 57 schools were identifiable as white; only 24 schools were not identifiable by race; and the faculties of 90% of the schools were still obviously white or black. In the elementary schools about three-fourths of the 13,010 black elementary pupils attended black or predominantly black schools. The courts below,

in applying the teachings of *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968) and *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968), properly found the schools to be unlawfully segregated.

The district judge found that the segregation of black students in Charlotte had produced its inevitable results in retarded achievement. Although this case does not depend upon such findings of harm to black children, *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958), these facts profoundly impressed Judge McMillan and underscored the importance of his holding that the school board has "a duty to act positively to fashion affirmatively a school system as free as possible from the lasting effects of such historical apartheid" (293a).

The courts below found that the segregation of school children in Charlotte was caused by actions of governmental officials. The school board, for its part had over the years chosen school sites, determined capacities and drawn zone lines in a fashion to promote segregation. The residential segregation found in Charlotte was in large part created and maintained by the official actions of those involved in planning, zoning, public housing, urban renewal and other activities. Neighborhoods were kept white by the use of racial covenants, the functional equivalent of racial zoning ordinances. (*Bell* v. *Maryland*, 378 U.S. 226, 329 (1964), Mr. Justice Black dissenting.) Thus, no claim that the schools should remain segregated by reference to a "neighborhood school" policy is tenable. As this Court made plain in *Cooper* v. *Aaron*, 358 U.S. 1, 16-17 (1958), school boards are agents of the state and will not be excused from their duty to guarantee the constitutional rights of Negro children because the "vindication of those rights was rendered difficult or impossible by actions of other state officials."

II

The goal set by the district court to eliminate the racial identity of the present "black" schools in the Charlotte-Mecklenburg system is in conformity with the decisions of this Court. Upon finding that the continued existence of all-black schools in Charlotte was the result of racial discrimination by the school board and other governmental agencies, the court was required to seek ways to eliminate the consequences of these discriminatory actions. This Court has said in *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968) that "the system of segregation and its effects" (*id.* at 440) must be dismantled (*id.* 391 U.S. at 437), and eliminated "root and branch" (*id.* at 438). A desegregation plan must "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools" (*id.* at 442) and courts are to enter decrees "which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (*id.* at 438, note 4).

The trial judge, therefore, when he found it was necessary to appoint a consultant to assist him in preparing a plan because of the recalcitrance of the school board, appropriately instructed the consultant that black schools were illegally segregated in Charlotte and that "efforts should be made to reach a 71-29 [white-black] ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable." This specific, although flexible, goal for pupil assignments is exactly parallel to the kind of goal for faculty desegregation set by the district court and approved by this Court in *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1968).

In contrast to the complete relief sought by the district court, the court of appeals has announced a new rule looking toward less than complete relief. The new principle requires that in each case a court must decide whether the goal of complete desegregation to eliminate racially identifiable schools is a "reasonable" goal in that it can be accomplished by "reasonable" means. The new rule portends serious consequences for the general course of school desegregation. It is a new litigable issue which will produce less desegregation and at a slower pace. The rule is vague and ambiguous. The only thing clear about it is that it means less desegregation than the standard which we understood to apply before, that is, whether a plan is feasible. And there is no question as to the feasibility of the plan set aside by the court of appeals.

The court of appeals agrees with the district court that the segregation sought to be dismantled is illegal, but holds that, for some reason, the remedy is not worth the price. We think such a finding is unacceptable in the United States and conflicts with *Griffin* v. *School Board*, 377 U.S. 218 (1964). The techniques to right the wrong found to exist in Charlotte are at hand as the court ordered plan so clearly demonstrates. The holding of the court of appeals threatens to water down or temper the duty to convert to a unitary system. It should be rejected.

The defendants have argued that provisions of the Civil Rights Act of 1964 (Sections 401(b) and 407(a)(2), codified as 42 U.S.C. §§2000c(b) and 2000c-(a)(2)) forbid the busing ordered by the district court. We think the disposition of this issue by the court below was clearly correct in ruling that the Civil Rights Act placed "no limitations on the power of school boards or the courts to remedy unconstitutional segregation" (1274a). This is the construc-

tion placed on the statute by all four circuits which have addressed the issue. Moreover, the district court did not impose racial balance. Under its order the schools would vary from 3% to 41% black. What the court did do was to set a specific, yet flexible goal, the purpose of which was "the compliance of this school system with the Constitution by eliminating the racial characteristics of its schools" (Br. A10).

III

The court-ordered desegregation plan meets the most important test of *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968), in that the plan does promise to actually dismantle the dual system and provide a unitary system of schools. The principle characteristics of the dual system—the all-black schools—will be gone. The plan works.

The plan was produced because the district judge undertook the duty imposed upon him by law to seek means of desegregating the schools. It would seem beyond question that the court, having a detailed, feasible plan before it which desegregated all the schools was correct in judging that the board had failed to meet its "heavy burden . . . to explain its preference for an apparently less effective method." *Green, supra,* at 439.

We agree with the dissenters below that the proper test is whether a plan is "feasible" and whether it provides "effective relief," (*Green, supra,* at 439) not whether in the subjective judgment of a court the means are "reasonable." We do not understand the court below to question the feasibility of the plan. The plan calls for a transportation system which would be commensurate with the percentage of pupils transported in the state. The additional

busing would be for considerably shorter distances and take less time than the average distance and time for the bus trips for the 23,000 students presently transported in 1969-70. Nearly 11,000 elementary children are now being bused in the system. About 700 pre-school children are being transported great distances. The cost of the additional transportation will be a tiny fraction of the school budget. Enough buses are either on hand or available to be purchased or borrowed to implement the plan. The plan is educationally sound. The only impediment to the immediate conversion to a unitary school system under the court's plan is the board's unwillingness to do so.

The courts below approved of the techniques of pairing and clustering with transportation as appropriate and here necessary means, to desegregate the schools. Pairing was approved in *Green* (*supra* at 442, n. 6) and has been required in scores of school districts. Bus transportation is an ordinary tool of desegregation and has been required to desegregate schools. Since the constitutional imperative in this case is the desegregation of the schools, we can conceive of no reason why the courts below were wrong in holding that busing be employed.

We think that the courts below were also correct in rejecting the defendants' arguments that there is something wrong with assigning children to schools outside of their zones of residence. School boards have traditionally and necessarily reserved the right to alter attendance lines, grade structures and educational programs for their schools. As the district court's decision plainly shows, segregation can be eliminated by choosing to alter grade structures and provide transportation. The only reason for limiting assignments to adjacent zones in Charlotte would be to preserve segregation. In Charlotte only 541 of 17,000 of the children in black schools ride buses. At the white

schools, however, over 40% of the children already ride school buses. The question is not whether children will ride school buses, but where the buses will go.

The neighborhood school theory cannot be invoked now in support of segregation when it has been traditionally ignored to promote segregation. This is particularly true in a state which buses over 54% of the children in public schools.

The court of appeals has violated traditional standards of review in overturning the decision of the district court. In school desegregation cases district courts have been admonished to assess "the circumstances present and options available in each instance." *Green, supra,* at 439. And "in this field the way must always be left open for experimentation." *United States* v. *Montgomery County Board of Education, supra,* at 235. The equitable decree entered by the district court was faithful to those instructions and should not have been disturbed without a strong showing of abuse of discretion. *United States* v. *W. T. Grant Co.,* 345 U.S. 629 (1953). Instead of the traditional standards of review, the court of appeals fashioned its own subjective rule of reasonableness and vacated the district court's judgment. This new rule signals to district judges that their room for "experimentation" and their "options" are strictly limited. The signal is "go slow." We submit that the decision below has not only undercut *Green* and *Montgomery County,* but runs counter to the philosophy of *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969) which requires immediate and effective relief. As Judge Sobeloff observed in dissent "reasonableness" is "all deliberate speed" in a new guise.

ARGUMENT

I.

The Public Schools of the Charlotte-Mecklenburg School System Are Racially Segregated in Violation of the Equal Protection Clause of the Fourteenth Amendment as the Result of Governmental Action Causing School Segregation and Residential Segregation.

A. *The Schools Are Organized in a Dual Segregated Pattern.*

Both courts below held that the Charlotte-Mecklenburg system was still unconstitutionally racially segregated. The record amply supports that finding and conclusion. Prior to this suit in 1965 there had been only a token break of the pattern of total racial segregation mandated by state law. The desegregation plan adopted in 1965 and continued in effect through the 1969-70 school term provided for the assignment of pupils by geographic attendance zones with pupils allowed a "free transfer" to attend the schools outside their areas of residence.[46] This is substantially the same kind of plan considered by this Court and found to be inadequate in *Monroe* v. *Board of Commissioners,* 391 U.S. 450 (1968).[47] The court below concluded that: "The neighborhood school concept and freedom of choice as administered are not furthering desegregation" (313a; 300 F. Supp. at 1372). The court concluded that the Mecklenburg "rural schools are largely desegregated" but that in

[46] The plan was approved in 1965, and affirmed on appeal. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 243 F. Supp. 667 (W.D. N.C. 1965), affirmed, 369 F.2d 29 (4th Cir. 1966).

[47] A similar plan for geographic assignments and free transfers was also involved in *Northcross* v. *Board of Education of Memphis,* 397 U.S. 232 (1970).

the city of Charlotte "schools are still largely segregated" (302a; 300 F. Supp. at 1367-1368). Although the plan was modified in July 1969 to attempt to increase desegreation by closing certain black schools, there was little actual improvement.[48] Judge McMillan summarized the extent of desegregation during the 1969-70 term in these words:

> Of the 24,714 Negroes in the schools, something above 8,500 are attending "white" schools or schools not readily identifiable by race. *More than 16,000, however, are obviously still in all-black or predominantly black schools.* The 9,216 in 100% black situations are considerably more than the number of black students in Charlotte in 1954 at the time of the first *Brown* decicision. The black school problem has not been solved.
>
> The schools are still in major part segregated or "dual" rather than desegregated or "unitary" (661a).

The court found that "nearly 13,000 out of 24,714 black students still attend schools that are 98% to 100% black"; that "nine-tenths of the faculties are still obviously 'black' or 'white' "; and that "over 45,000 out of 59,000 white students still attend schools which are obviously 'white' "

---

[48] The July 29, 1969, plan, which was approved for one year only, did not produce the promised improvement and the court held that there had been a wide "gap" between the school board's promise and its performance (659a). The court found that "only 1,315 instead of the promised 4,245 black pupils" were transferred to white schools under the 1969 plan (659a). Even worse, the manner in which the free transfer feature operated threatened to transform some integrated schools into all-black schools threatening a "rapid shift from white to black, [so that] the net result of the 1969 pupil plan would be nearly zero" (659a). By March 1970, the court found even less progress: "In substance, the plan which was supposed to bring 4,245 children into a desegregated situation had been handled or allowed to dissipate itself in such a way that only about one-fourth of the promised transfers were made; and as of now only 767 black children are actually being transported to suburban white schools instead of the 4,245 advertised when the plan was proposed by the board" (1226a).

(702a). During the school term just ended there were 11 schools which were 100% black, 5 schools 98-99% black, 3 schools 90-97% black, and 6 schools 55-89% black (660a). Thus, in a school system where black pupils were but 29% of the total, there were 25 schools out of 106 which the district judge held were "readily identifiable as black" (660a).[49]

Segregation was particularly intense at the elementary school level. About three-fourths of black elementary pupils attended predominantly black or all-black schools. There were 9,718 (or 74.6%) of the 13,010 black elementary pupils in schools which were from 65% to 100% black (832a-834a) and 60.7% of all black elementary pupils attended schools that were 98-100% black (id.).[50]

The court of appeals agreed with the district court that there was still a dual segregated system saying: "Notwithstanding our 1965 approval of the school board's plan, the district court properly held that the board was impermissibly operating a dual system of schools in the light of subsequent decisions of the Supreme Court, *Green* v. *School Bd. of New Kent County*, 391 U.S. 430, 435 (1968), *Monroe* v. *Bd. of Comm'rs*, 391 U.S. 450 (1968), and *Alexander* v. *Holmes County Bd. of Ed.*, 396 U.S. 19 (1969)" (1263a-1264a).

---

[49] The judge classified 57 schools as readily indentifiable as white schools and 24 as not readily identifiable by race (660a).

[50] The 1969-70 elementary school breakdown for heavily black schools is as follows (832a-834a):

	No. of Elementary Schools	*No. of Elementary Students*		
% Black		*White*	*Black*	*Totals*
100%	8	1	5,311	5,312
98–99%	4	32	2,536	2,568
92%	1	83	902	985
65–80%	3	378	969	1,347
	16	494	9,718	10,212

The several desegregation plans proposed by the school board were rejected by the courts below because they failed to accomplish sufficient desegregation.[51] The board sought to defend its fourth plan, filed in February 1970, in the court below. But the court of appeals held that "The district court properly disapproved the school board's elementary school proposal because it left about one-half of both the black and white elementary pupils in schools that were nearly completely segregated."[52]

The district judge examined the academic achievement test results of pupils in the segregated and desegregated schools in Charlotte and concluded that black children in

---

[51] The board's May 1969 plan was the same basic plan which had been rejected in April 1969 with some modification of pupil transfer rules. The district court found that the free transfer plan did not accomplish desegregation. See 300 F. Supp. at 1384; 453a. The board's July 1969 plan was approved "reluctantly" for one year only. This plan closed 7 all-black schools and allowed pupils from the closed schools to be transported (if they so chose) to white schools. There was substantial opposition in the black community to the fact that this plan operated by one-way busing of blacks to white schools but closed black schools instead of desegregating them. The court found that the plan accomplished little increase in desegregation. The board's third proposal, the November 17, 1969, plan was rejected in the order of December 1, 1969. This plan called for rezoning. The court found that it would maintain 7 all-black schools and that most of the 25 black schools serving 16,197 of the 24,714 black children would be continued as black schools (701a).

[52] The board's senior high school plan, involving rezoning, was approved by the trial court with one exception. The court changed the zones to shift 300 black pupils in a designated area to Independence High School. This change created a satellite zone for Independence and the court of appeals rejected the board's appeal, and approved the change as one which "will tend to stabilize the system by eliminating an almost totally white school in a zone to which other whites might move with consequent 'tipping' or resegregation of other schools" (1273a). The board's proposals for junior high schools were found unacceptable because the plan would have left Piedmont Junior High 90% black and shifting toward 100% black.

Charlotte were suffering a substantial educational deprivation caused by segregation. Judge McMillan found that:

> Segregation produces inferior education, and it makes little difference whether the school is hot and decrepit or modern and air-conditioned.
>
> It is painfully apparent that "quality education" cannot live in a segregated school; *segregation itself is the greatest barrier to quality education* (588a).

The judge found that "segregation in Mecklenburg County has produced its inevitable results in the retarded educational achievement and capacity of segregated school children" (587a). Sixth grade students in black schools were on the average achieving at a fourth grade level on national achievement tests, whereas there was substantially higher levels in integrated and white schools (304a; 588a; 702a-704a).

More recent data was reviewed in the opinion entered on August 3, 1970. The gross disparities remained. Judge McMillan concluded:

> Of factors affecting educational progress of black children, segregation appears to be *the factor under control of the State,* which still constitutes the greatest deterrent to achievement (Br. A9).

As noted above, Judge McMillan was persuaded by the expert testimony[53] and by the facts of the case that "segregation itself is the greatest barrier to quality educa-

---

[53] Plaintiffs' experts had testified at the hearing in March, 1969 in agreement with the conclusion of the Civil Rights Commission that: "The evidence indicates that Negro children attending desegregated schools that do not have compensatory education programs perform better than Negro children in racially isolated schools with such programs." *Racial Isolation in the Public Schools,* A Report of the United States Commission on Civil Rights, 205 (1967).

tion" (588a). And the school board apparently does not perceive compensatory education as a viable substitute for desegregation in creating equal educational opportunities for its black children:

> The defendants have come forward with no program nor intelligble description of 'compensatory education,' and they advance no theory by which segregated schools can be made equal to unsegregated schools (Br. A16).

Whatever doubts there may be about the standardized achievement tests as measuring instruments, the results profoundly impressed the trial judge that black children in Charlotte's all-black schools were not receiving an equal education. Of course, the case does not depend as a legal matter upon such local findings of educational harm. "The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law." *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958). The segregation system was a massive intentional disadvantaging of the Negro minority by the white majority and its elimination is an urgent task. The district judge correctly held that the school board has "a duty to act positively to fashion affirmatively a school system as free as possible from the lasting effects of such historical apartheid" (293a).

B. *Governmental Agencies Created Black Schools in Black Neighborhoods by Promoting School Segregation and Residential Segregation.*

The findings of the district court make it plain that the existing pattern of school segregation in Charlotte-Mecklenburg is the deliberate result of state action designed to create a segregated school system. The court found that all

the school segregation in Charlotte was illegal and that there was no aspect of possibly innocent or adventitious segregation. Each and every black school in the system was held to be segregated in violation of the constitutional prohibitions against racial discrimination:

> On the facts in this record and with this background of *de jure* segregation extending full fifteen years since *Brown I*, this court is of the opinion that all the black and predominantly black schools in the system are illegally segregated, *Green* v. *New Kent County; Henry* v. *Clarksdale; United States* v. *Hinds County* (711a).

The district court made no attempt to proclaim a general principle that all-black schools are illegally segregated *per se*. He held only that the particular all-black schools in Charlotte were illegally segregated.[54] That conclusion was supported by substantial evidence and findings.

Judge McMillan found that the school board had gerrymandered school attendance areas to promote segregation, selected the sites and sizes of schools to promote segregation, and used the school transportation system toward the same end. It was held that the racial makeup of the schools had been controlled:

> . . . the court finds as a fact that no zones have apparently been created or maintained for the purpose of promoting desegregation; that the whole plan of "building schools where the pupils are" without further control promotes segregation; and that certain schools, for example Billingsville, Second Ward, Bruns Avenue and Amay James, obviously serve school

[54] Judge McMillan stressed this point in his recent opinion. See section headed, "*This is a local case in a local court—a lawsuit—to test the constitutional rights of local people*" (Br. A12).

> zones which were either created or which have been controlled so as to surround pockets of black students and that the result of these actions is discriminatory. These are not deemed as an exclusive list of such situations, but as illustrations of a long standing policy of control over the makeup of school population which scarcely fits any true "neighborhood school" philosophy (455a-456a).

The court heard extensive evidence about the extent of residential segregation in Charlotte and the governmental responsibility for the existing pattern of almost total residential separation. About 98% of the black inhabitants of Charlotte reside in the northwest quadrant of Charlotte. Judge McMillan summarized the findings about how this extensive segregation came about in these words:

> The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts respecting their locations, their controlled size and their population have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action all deriving their basic strength originally from public law or state or local governmental action. These elements include, among others, the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools

so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or "*de facto*," and the resulting schools are not "unitary" or desegregated (1228a-1229a).

The Fourth Circuit accepted these findings and conclusions stating that they were "supported by the evidence" (A. 1264a). The Fourth Circuit opinion mentions that "North Carolina courts, in common with many courts elsewhere, enforced racial restrictive covenants on real property until *Shelley* v. *Kramer*, 334 U.S. 1 (1948), prohibited this discriminatory practice" (*ibid.*). See, e.g., *Phillips* v. *Wearn*, 226 N.C. 290, 37 S.E.2d 895 (1946) (involving property in Mecklenburg County); *Eason* v. *Buffaloe*, 198 N.C. 520, 152 S.E. 496 (1930); *Vernon* v. *R. J. Reynolds Realty Co.*, 226 N.C. 58, 36 S.E.2d 710 (1946). Racial restrictive covenants operated to exclude Negroes from entire areas of cities. They had the same effect and purpose as residential segregation laws and ordinances of the kind outlawed by *Buchanan* v. *Warley*, 245 U.S. 60 (1917). Indeed, restrictive covenants were the functional and practical equivalent of such segregation ordinances when they were enforced by injunctions as in *Shelley*, *supra*, or damage suits (see *Barrows* v. *Jackson*, 346 U.S. 249 (1953)). Mr. Justice Black has pointed out that *Shelley* was argued to this Court on this basis by the Solicitor General, among others:

> This type of agreement constituted a restraint on alienation of property, sometimes in perpetuity, which, if valid, was in reality the equivalent of and had the effect of state and municipal zoning laws accomplishing the same kind of racial discrimination as if the State had passed a statute instead of leaving this objective

to be accomplished by a system of private contracts. (*Bell* v. *Maryland*, 378 U.S. 226, 329 (1964), Mr. Justice Black, dissenting.)

Judge McMillan's findings about the causes of residential segregation in Charlotte are entirely corroborated by the national experience as reported by the United States Commission on Civil Rights. The Commission's formal findings were:

> 5. Within cities, as within metropolitan areas, there is a high degree of residential segregation—reflected in the schools—for which responsibility is shared by both the private housing industry and government.
>
> (a) The discriminatory practices by city landlords, lending institutions, and real estate brokers have contributed to the residential confinement of Negroes.[55]
>
> (b) State and local governments have contributed to the pattern of increasing residential segregation through such past discriminatory practices as racial zoning ordinances and racially restrictive covenants capable of judicial enforcement. Current practices in such matters as the location of low-rent public housing projects, and the displacement of large numbers of low-income nonwhite families through local improvement programs also are intensifying residential segregation.[56]
>
> (c) Federal housing programs and policies serve to intensify racial concentrations in cities. Federal policies governing low- and moderate-income housing pro-

[55] See the testimony of Daniel O. Hennigan covering this kind of discrimination in Charlotte (28a-57a).

[56] See the testimony of Yale Rabin concerning state and local actions in Charlotte (174a-241a).

grams such as low-rent public housing and FHA 221 (d)(3) do not promote the location of housing outside areas of intense racial concentration. Federal urban renewal policy is insufficiently concerned with the impact of relocation on racial concentrations within cities.

6. Individual choice contributes to the maintenance of residential segregation, although the impact of such choice is difficult to assess since the housing market has been restricted. (*Racial Isolation in the Public Schools, supra,* at 201-202.)

The Commission reported that the policy of the Federal Housing Administration in the 1930's and 1940's was a "principal impetus to housing discrimination" (*Id.* at 254).[57] The FHA not only recommended the insertion of racial covenants, but even after *Shelley* v. *Kraemer, supra,* the Commission reports, "the FHA continued to treat racial integration in housing as a reason for denying benefits to an applicant" (*id.* at 254; citing Abrams, *Forbidden Neighbors,* 233 (1955), and Weaver, *The Negro Ghetto,* 71-73 (1948)).

The court below thus accepted the finding of the trial court that the schools in Charlotte were illegally segregated. Judge Butzner wrote:

> The fact that similar forces operate in cities throughout the nation under the mask of *de facto* segregation

[57] A glaring example of the nearly inevitable effect of the policy of the federal government to promote residential segregation and the school board's policy of building schools in accommodation of that policy is the Double Oaks School. The federal housing officials and the local housing authority built a low-income housing development for blacks, leaving space for a school. The school board built a school to serve the children of that project. In 1969-70, as in previous years, only black children attended Double Oaks—over 800 (832a). This is one of the ten schools the board would leave all-black (*id.*) and is one of the two schools HEW would leave all-black.

> provides no justification for allowing us to ignore the part that government plays in creating segregated neighborhood schools (A. 1264a-1265a).

The court below thus rejected the board's argument that segregation in the Charlotte schools could be justified by reference to a "neighborhood school" policy. The Fourth Circuit cites a number of decisions where courts have reached similar conclusions about the relation between segregated housing policies and segregated schools, *e.g.*, *Henry* v. *Clarksdale Munic. Separate School Dist.*, 409 F.2d 682, 689 (5th Cir. 1969), *cert. denied*, 396 U.S. 940 (1969); *United States* v. *School Dist. 151 of Cook County*, 404 F.2d 1125, 1130 (7th Cir. 1968), *aff'g* 286 F. Supp. 786, 798 (N.D. Ill. 1968); *Brewer* v. *School Bd. of City of Norfolk*, 397 F.2d 37, 41 (4th Cir. 1968); *Keyes* v. *School Dist. No. One, Denver*, 303 F. Supp. 279 and 289 (D. Colo. 1969), *stay vacated*, 396 U.S. 1215 (1969); *Dowell* v. *School Bd. of Oklahoma City*, 244 F. Supp. 971, 975 (W.D. Okla. 1955), *aff'd*, 375 F.2d 158 (10th Cir.), *cert. denied*, 387 U.S. 931 (1967).[58]

It does not matter, for purposes of judging the constitutionality of the resulting school segregation, that agencies of the state, other than the local school board, are in part

---

[58] See also *Holland* v. *Board of Public Instruction of Palm Beach County*, 258 F.2d 730, 732 (5th Cir. 1958). In a number of recent decisions the Fifth Circuit has held that geographic zoning plans are acceptable only if they tend "to disestablish rather than reinforce the dual system of segregated schools." *United States* v. *Greenwood Municipal Sep. School Dist.*, 406 F.2d 1086, 1093 (5th Cir. 1969); *United States* v. *Indianola Municipal Sep. School Dist.*, 410 F.2d 626 (5th Cir. 1969), *cert. denied*, —— U.S. —— (1970); *Davis* v. *Board of School Comm'rs of Mobile County*, 393 F.2d 690, 694 (5th Cir. 1968); *United States* v. *Choctaw County Board of Ed.*, 417 F.2d 838 (5th Cir. 1969); *Braxton* v. *Board of Public Instruction of Duval County*, 402 F.2d 900 (5th Cir. 1968); *Valley* v. *Rapides Parish School Board*, 423 F.2d 1132 (5th Cir. 1970); *Youngblood* v. *Board of Public Instruction of Bay County, Fla.*, —— F.2d —— (5th Cir., No. 29369, July 24, 1970).

responsible for the residential segregation pattern. As this Court made plain in *Cooper* v. *Aaron*, 358 U.S. 1, 16-17 (1958), school boards are agents of the state and will not be excused from their duty to guarantee the constitutional rights of Negro children because the "vindication of those rights was rendered difficult or impossible by the actions of other state officials." Nor is the local board's responsibility relieved by the fact that private as well as governmental discrimination in housing has contributed to the segregated residential pattern. As Judge McMillan has found, the board has made choices in locating schools, fixing the sizes and grade structures of schools, determining the transportation patterns, and adopting the policy of assigning pupils by residences. The board has defined the relevant school "neighborhoods" by its own decisions. Housing segregation results in school segregation only in the context of these choices by the school board—an agency of the state. Thus, a situation which has the appearance of inevitability—school segregation in Charlotte's black ghetto—is revealed as the product of governmental decision-making. As the Fourth Circuit held in *Brewer* v. *School Board of the City of Norfolk*, 397 F.2d 37, 41-42 (4th Cir. 1968):

> If residential racial discrimination exists it is immaterial that it results from private action. The school board cannot build its exclusionary attendance areas upon private racial discrimination. Assignment of pupils to neighborhood schools is a sound concept, but it cannot be approved if residence in a neighborhood is denied to Negro pupils solely on the ground of color (Footnotes omitted).

The reasoning in *Brewer* is all the more apt where, as here, government has contributed heavily to creating the segregated housing pattern.

II.

The District Court Was Correct in Ruling That the Dual Segregated System in Charlotte-Mecklenburg Must Be Disestablished by Reorganizing the System So That No Racially Identifiable Black Schools Remained. The Court of Appeals Erred in Substituting a Less Specific Desegregation Goal.

A. *This Court's Decisions Require Complete School Desegregation.*

The district court sought to afford complete relief in this case by requiring a desegregation plan which would eliminate the racially identifiable "black" schools and leave "just schools". The trial judge's decision that each predominantly black or all-black school in Charlotte must be reorganized on an integrated basis by reassigning pupils and faculties is in conformity with this Court's decisions defining the duty to eliminate state-imposed segregation in the public schools. *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), and *Brown* v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II*). *Brown II* speaks of the need "to achieve a system of determining admission to the public schools on a nonracial basis." (349 U.S. at 300-301) In *Cooper* v. *Aaron*, 358 U.S. 1, 7 (1958), the Court wrote of the duty of "initiating desegregation and bringing about the elimination of racial discrimination in the public school system." In 1968, in *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), the Court made it plain that *Brown* required more than simply a system of nondiscriminatory admission of Negroes to "white" schools. Rather, the whole system of segregation must be dismantled (*id.*, 391 U.S. at 437), and discrimination must be eliminated "root and branch" (*id.* at 438). The Con-

stitution requires "abolition of the system of segregation and its effects" (*id.* at 440).

This Court has called for the abolition of racially identifiable schools saying that desegregation plans must "promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools" (*id.* at 442). The requirement of complete relief was emphasized by the holding in *Green, supra,* that courts should render decrees "which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (391 U.S. at 438, note 4). Mr. Justice Brennan's opinion said that the courts should "retain jurisdiction until it is clear that state-imposed segregation has been completely removed" (*id.* at 439). Thus it ought to be entirely clear that this Court's decisions require fundamental reform of racially segregated dual systems to abolish every vestige of segregation and prevent its recurrence. The courts are not limited to requiring a mere minimum amount of desegregation which might give the bare appearance of non-discriminatory assignments. Rather, the lower courts have been admonished to strike out the roots and branches of the segregated system. The district court's decision was faithful to the duty set out in *Green, supra.*

Judge McMillan, having determined that the black schools in Charlotte were illegally segregated, directed his expert consultant to devise a plan which eliminated the black schools. Judge McMillan had to appoint his own consultant to devise a plan because of what Judge Sobeloff has aptly described as the school board's "total lack of cooperation" and the fact that the board "has resisted and delayed desegregation at every turn" (1293a; see note 9 at 1291a-1293a). Accordingly, the court set forth detailed guidelines for the court consultant to follow in preparing

the plan. Among the criteria set forth in the December 1, 1969, opinion are the following:

> 2. Drawing school zone lines, like "freedom of transfer," is not an end in itself; and a plan of geographic zoning which perpetuates discriminatory segregation is unlawful . . . [citations omitted].
>
> • • •
>
> 12. Fixed ratios of pupils in particular schools will not be set. If the board in one of its three tries had presented a plan for desegregation, the court would have sought ways to approve variations in pupil ratios. In default of any such plan from the school board, the court will start with the thought, originally advanced in the order of April 23, that efforts should be made to reach a 71-29 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others, but to understand that variations from that norm may be unavoidable.
>
> • • •
>
> 14. Where pupils live must not control where they are assigned to school, if some other approach is necessary in order to eliminate racial segregation . . . [citations omitted].
>
> 15. On the facts in this record and with this background of *de jure* segregation extending full fifteen years since *Brown I*, this court is of the opinion that all the black and predominantly black schools in the system are illegally segregated . . . [citations omitted].
>
> • • •
>
> 17. Pairing of grades has been expressly approved by the appellate courts . . . [citations omitted]. Pairing, grouping, clustering, and perhaps other methods

may and will be considered and used if necessary to desegregate the schools.

18. Some 25,000 out of 84,000 children in this country ride school busses each day, and the number *eligible* for transportation under present rules may be more than 30,000. A transportation system already this massive may be adaptable to effective use in desegregating schools (708a-712a).

Petitioners urge that the desegregation goals for Charlotte which were set forth in the trial court's instructions to the expert consultant were entirely appropriate under this Court's decision in the *Green* case. This Court's decision in *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1968), also provides a substantial precedent for the trial judge's approach in setting a concrete desegregation objective. Judge Winter's dissenting opinion below states this well (1301a-1302a):

> The district court wisely attempted to remedy the present dual system by requiring that pupil assignment be based "as nearly as practicable" on the racial composition of the school system, 71% white and 29% black. The plan ordered fell short of complete realization of this remedial goal. While individual schools will vary in racial composition from 3% to 41% black, most schools will be clustered around the entire system's overall racial ratio. It would seem to follow from *United States* v. *Montgomery Board of Education*, 395 U. S. 225, 232 (1968), that the district court's utilization of racial ratios to dismantle this dual system and remedy the effects of segregation was at least well within the range of its discretion. There the Supreme Court approved as a requirement of faculty integration that "in each school the ratio of white to Negro

faculty members is substantially the same as it is throughout the system." It did so recognizing that it had previously said in *New Kent County,* 391 U. S. at 439, "[t]here is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." If in a proper case strict application of a ratio is an approved device to achieve faculty integration, I know of no reason why the same should not be true to achieve pupil integration, especially where, as here, some wide deviations from the overall ratio have been permitted to accommodate circumstances with respect to particular schools.

B. *The Fourth Circuit's New Reasonableness Rule Makes the Goal of Desegregation Less Complete and Specific and Threatens to Undermine Brown v. Board of Education.*

The court below, by a narrow vote (actually, only three members of the court), has explicitly announced a new rule of law to govern all school desegregation cases. The new principle requires that in each case a court must decide whether the goal of complete desegregation to eliminate racially identifiable schools is a "reasonable" goal in that it can be accomplished by "reasonable" means. Thus we have not merely an issue about the reasonableness of particular desegregation plans or techniques, but rather, an issue about the reasonableness of the goal of desegregation.

As Judge Sobeloff has stated so clearly in his dissent, the new rule portends serious consequences for the general course of school desegregation:

. . . Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt.[59] The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. Thus, rarely would it be possible to make expeditious disposition of a board's claim that its segregated system is not "reasonably" eradicable. Even more pernicious, the new-born rule furnishes a powerful incentive to communities to perpetuate and deepen the effects of race separation so that, when challenged, they can protest that belated remedial action would be unduly burdensome" (1290a-1291a).

We believe that the court of appeals erred by not adopting the trial court's more specific requirement that each black school in Charlotte be reorganized so that it would no longer be a racially identifiable black school. The district judge made no effort to announce a rule of law to govern any case but the Charlotte case (Br. A 12-A13). He found that the Charlotte schools were unlawfully segregated and that it was educationally feasible to desegregate each of them. The Finger Plan demonstrates that desegregation of all the schools is indeed feasible, and we

---

[59] It was only two weeks later that Judge Sobeloff's prediction was realized. The trustees of School District No. 1 of Clarendon County, South Carolina urged upon the court of appeals the "reasonableness" of a freedom of choice plan which had not worked. *Brunson* v. *Board of Trustees of School District No. 1 of Clarendon County*, No. 14571, —— F.2d —— (4th Cir., June 5, 1970) (separate concurring opinion by Judge Sobeloff):

> "This case is the lineal descendant of *Briggs* v. *Elliot*, one of the four cases consolidated in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). [Footnote omitted] That it is still being litigated at this date, nineteen years since *Briggs* was initiated and sixteen years after the decision in *Brown* is a most sobering thought." *Ibid.*

do not understand the court of appeals majority to seriously question the general feasibility or educational soundness of the Finger Plan. However, the reasonableness doctrine was applied to set aside the Finger Plan for elementary schools on the ground that the board "should not be required to undertake such extensive additional busing to discharge its obligation to create a unitary school system" (1276a). At the same time, the reasonableness rule was applied to approve the Finger Plan for secondary schools involving busing, non-contiguous and satellite zoning, and similar techniques to eliminate each predominantly black secondary school.

The Fourth Circuit has explicitly attempted to formulate a legal principle to be applied in desegregation cases on a national basis. The rule was announced as one necessitated by the problem of some cities "which have black ghettos so large that integration of every school is an improbable, if not an unattainable goal" (1267a-1268a). It is particularly inappropriate and unecessary to attempt to frame such a rule in a case such as this, for Charlotte has no vast intractable desegregation problem as the Finger Plan demonstrates.[60] Desegregating the Charlotte schools is not a difficult matter in the technical sense. The technology to desegregate school systems of this size is readily available. The problem is and has been a problem of political and legal resistance to desegregation.[61] The

---

[60] Judge McMillan again found this to be so:

> There is no 'intractable remnant of segregation' in this school system. No part of the school system is cut off from the rest of it, and there is no reasonable way to decide what remnant shall be deemed intractable (Br. A18).

[61] Judge McMillan thoughtfully addressed this point in his recent decision. (See section headed *"The Issue Is One of Constitutional Law—Not Politics,* Br. A13-A14):

> Civil Rights are seldom threatened except by majorities. One whose actions reflect accepted local opinion seldom need

United States Commission on Civil Rights has recently made the point:

> It is a mistake to think of the problems of desegregation and the extent that busing is required to facilitate it solely in the context of the Nation's relatively few giant urban centers such as Chicago, New York, or Los Angeles. In most of our cities the techniques necessary to accomplish desegregation are relatively simple and create no hardships. The experience in communities which have successfully desegregated could easily be transferred to cities of greater size. (Statement of the United States Commission on Civil Rights Concerning the "Statement by the President on Elementary and Secondary School Desegregation", April 12, 1970.)

The real thrust of the "reasonableness rule" as applied to reject the elementary school plan is as Judge Sobeloff wrote:

> . . . no more than an abstract, unexplicated judgment —a conclusion of the majority that, all things considered, desegregation of this school system is not worth the price. This is a conclusion neither we nor school boards are permitted to make.

If the reasonableness of school desegregation as a goal is to be litigated in every case by a subjective assessment of

---

to call upon the Constitution. It is axiomatic that persons claiming constitutional protection are often, for the time being, out of phase with the accepted "right" thinking of their local community. If in such circumstances courts look to public opinion or to political intervention by any other branch of the government instead of to the more stable bulwarks of the Constitution itself, we lose our government of laws and are back to the government of man, unfettered by law, which our forefathers sought to avoid (Br. A14).

whether the end justifies the cost involved, then the *Brown* decision will in many places become a practical nullity.

As the National Education Association Brief *Amicus Curiae* in support of the Petition for Certiorari in this case has pointed out, the Fourth Circuit decision is paradoxical in that while it "creates a wide ambit for the exercise of discretion to limit desegregation, it severely, and NEA believes unwarrantedly, restricts the traditional discretion of the district court to frame a plan which will secure the constitutional objective." (NEA Brief *Amicus Curiae*, p. 21, note 19.)

The reasonableness rule is so vague, ill-defined, and, in Judge Sobeloff's phrase, "inherently ambiguous" (1289a) that it is "highly susceptible to delaying tactics in the courts" (1290a). The Charlotte-Mecklenburg board illustrates this by the Cross-Petition for Certiorari which defends the reasonableness rule but argues that the Fourth Circuit has misapplied its own rule in approving the junior and senior high school desegregation plans ordered by the district court. The point is that the opinion below contains no standards by which to judge the reasonableness question. The specific application in Charlotte, in which the plan for high schools and junior high schools was approved by the court of appeals, yet the elementary plan was disapproved, leaves the law in great uncertainty. The result implies that it may be legal to deny a desegregated education to some black children and that the only requirement is to offer constitutional protections to a reasonable number of them. Such a doctrine is alien to the requirement that the States shall not deny "to *any person* within their jurisdiction, the equal protection of the laws" (emphasis supplied). The reasonableness rule, if applied in this fashion, would conflict with the tradition of personal constitutional rights under the Fourteenth Amendment. (See Br. A 13.)

Judge Butzner's decision suggests that complete desegregation can be achieved only in "towns, small cities, and rural areas" (1267a). The ruling implies that some indefinite number of elementary pupils will remain in predominantly black and perhaps all-black schools, by its statement that "not every school in a unitary system need be integrated" and that while boards "must use all reasonable means to integrate the schools" sometimes "black residential areas are so large that not all schools can be integrated by using reasonable means."[42] This holding, by acknowledging that the black schools are the product of illegal segregation practices holds that the wrong is without a remedy.

We urge that this Court reject the notion that the constitutional rights of black citizens to equal protection of the laws may be left without a remedy in the courts of the United States. The concept that a state may violate the constitutional rights of citizens because it is too expensive to protect those rights is unworthy of our legal system and a betrayal of our constitutional heritage. Judge McMillan stated the correct rule: "The alleged high cost of desegregating schools (which the court does not find to be a fact) would not be a valid legal argument against desegregation, *Griffin* v. *School Board* [377 U.S. 218 (1964)]; *United States* v. *Cook County, Illinois* [404 F. 2d 1125 (7th Cir. 1968)]" (710a). See also, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); cf. *Baldwin* v. *New York*, 26 L.ed 2d 437 (1970).

The court below suggests three measures which might be taken instead of eliminating racially identifiable schools, e.g., providing an integrated school for each child in later

[42] There is perhaps some slight unclarity in the application of the rule to this case, for the court fails to state categorically that Charlotte's black residential area is of such size that schools must remain black.

years (as at the secondary school level), establishing special integrated programs in the black schools, and permitting black pupils the right of free transfer to leave the all-black schools. None of these suggestions represents a satisfactory substitute for the constitutional right to attend school in a system where racial identification of the schools has been removed and there are "just schools." *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 442 (1968). The idea of providing integration in later years is merely a postponement of the right of desegregation and conflicts with this Court's determination that the dual system must be abolished "now and hereafter." *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969). The provision of special integrated programs at black schools is by its terms limited to peripheral activities not central to the daily classroom experience of grade school children. The provision of free transfers for blacks has proven an unsuccessful method of desegregating the schools in Charlotte-Mecklenburg and it cannot be expected that any but a few blacks would benefit from the proposed rule allowing black students to transfer from majority black schools. *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968). These three measures, while unobjectionable in themselves, are simply no substitute for a desegregated school system.

The reasonableness rule threatens to undermine the *Brown* decision. As Judge Sobeloff has suggested in dissent, the holding threatens to water down or temper the duty to convert to a unitary system (1281a). Sixteen years after *Brown I* there is no room for retreat from the principle that racial segregation is unconstitutional and must be abolished. This Court has just recently rejected the doctrine of "all deliberate speed" because of the long experience of evasion and delay of the duty of desegregation. *Alexander* v. *Holmes County Board of Education*, 396 U.S.

19 (1969); *Dowell* v. *Board of Education of the Oklahoma City Public Schools*, 396 U.S. 269 (1969); *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970). The new and subjective reasonableness rule portends a new era of litigation under a subjective standard sanctioning a great deal of continuing racial segregation. It should not be followed.

C. *The Goal of Integrating Each School in Charlotte Is Consistent With Federal Statutory and Constitutional Requirements.*

The defendants have argued that provisions of the Civil Rights Act of 1964 (Sections 401(b) and 407(a)(2), codified as 42 U.S.C. §§2000c(b) and 2000c-6(a)(2)) forbid the busing ordered by the district court. The court of appeals rejected this reasoning stating that the argument "misreads the legislative history of the statute," and that the sections "are not limitations on the power of school boards or courts to remedy unconstitutional segregation" (1274a). The same argument has been rejected on numerous occasions by other courts and we think the treatment of this issue by the court below is sufficient to dispose of the question (1247a-1248a). Other courts have come to the same conclusion in a number of cases: *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 880-881 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. den. sub nom. Caddo Parish School Board* v. *United States*, 389 U.S. 840 (1967); *United States* v. *Board of Trustees of Crosby Independent School District*, 424 F.2d 625 (5th Cir. 1970); *Tillman* v. *Board of Public Instruction of Volusia County*, No. 29180, —— F.2d —— (5th Cir., April 23, 1970); *Andrews* v. *City of Monroe*, No 29358 —— F.2d ——(6th Cir., April 23, 1970); *United States* v. *School District 151, Cook County, Ill.*, 404 F.2d 1125, 1130 (7th Cir. 1968), *affirming* 286 F. Supp. 786 (N.D. Ill.); *Keyes* v. *School*

District No. One, Denver, 303 F. Supp. 289, 298 (D. Colo. 1969), *stay granted,* —— F.2d —— (10th Cir. 1969), *stay vacated,* 396 U.S. 1215 (1969); *Moore* v. *Tangipahoa Parish School Board,* 304 F. Supp. 244, 250 (E.D. La. 1969).

The board's construction of the Act would render it an unconstitutional attempt by the Congress to authorize the States to violate the Fourteenth Amendment by continuing segregation. But, of course, "Congress may not authorize the states to violate the Equal Protection Clause." *Shapiro* v. *Thompson,* 394 U.S. 618, 641 (1969); *Katzenbach* v. *Morgan,* 384 U.S. 641, 651, n. 10 (1966).

This case does not present the abstract question of whether any racial balance of the schools is required. By requiring the elimination of racially identifiable schools the trial judge did not impose any strict requirement that each school be a racial microcosm of the entire system. Certainly there was no question of balance unrelated to the requirement of eliminating unconstitutional racial segregation caused by the State. The district judge did not require any fixed racial ratios of pupils. He merely adopted the racial ratio "as a starting guide, expressed a willingness to accept a degree of modification, and departed from it where circumstances required" (1287a). As he recently wrote:

> The November 7, 1969 order expressly contemplated wide variations in permissible school population; and the February 5, 1970 order approved plans for the schools with pupil populations varying from 3% at Bain Elementary to 41% at Cornelius. This is not racial balance but racial diversity. The purpose is not some fictitious "mix," but the compliance of this school system with the Constitution by eliminating the racial characteristics of its schools (Br. A10).

Petitioners do not contend that the Constitution requires that formerly segregated systems must invariably convert to an arrangement in which every school has an approximate ratio which reflects the system-wide ratio of the races. The trial judge did not proceed on the theory that any such balancing was required by the Constitution, although the board's arguments continue to characterize the holding in this manner. But petitioners do urge that it is within the discretion of district courts to adopt as a remedial goal some specific target to measure progress toward eliminating racial identifiability of schools. *United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969). The objective of desegregation plans, to convert to a unitary system, might in some cases achieve a balanced system where every school is a racial microcosm of the entire system. Such racial balance plans may often be feasible as recent experience in Greenville, South Carolina demonstrates, for example. *Whittenberg* v. *School District of Greenville County,* C.A. No. 4396, D. S.C., Order of Feb. 4, 1970. The Greenville plan produced a ratio of about 20% black and 80% white in each school in a system with 58,000 children in 105 schools; it included transportation for pupils living more than 1½ miles from school. As we have said previously, this nation has more than adequate technology to integrate the schools and afford a quality education. It is generally possible to eliminate all-black schools by feasible desegregation plans. However, we take no absolutist position which ignores the possibility that there are exceptions to this rule. It is sufficient to decide this case to conclude that a feasible and workable plan to eliminate "black schools" and "white schools" is at hand.

III.

The District Court Acted Within the Proper Limits of Its Discretion by Ordering a Plan Consistent With the Affirmative Duty to Desegregate the Schools and the Objective of Preventing Resegregation.

A. *The Finger Plan Promises to Establish a Unitary System.*

The court-ordered desegregation plan meets the most important test of *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), in that the plan does promise to actually dismantle the dual system and provide a unitary system of schools. It is undisputed that the plan will eliminate the principal characteristics of the dual system—the all-black schools. This is the essential thing that a plan must accomplish in order to be an "adequate" plan under *Brown* v. *Board of Education*, 349 U.S. 294, 301 (1955), and *Green, supra*. *Green* calls for *results* in accomplishing desegregation. The trial judge understood this, stating:

> The courts are concerned primarily not with the techniques of assigning students or controlling school populations, but with *whether those techniques get rid of segregation of children in public schools.* The test is pragmatic, not theoretical. (582a)

Judge McMillan was also cognizant of this Court's advice that no "universal answer" or "one plan will do the job in every case." *Green, supra*, 391 U.S. 430, 439. He knew also that this Court had emphasized that "in this field the way must always be left open for experimentation." *United States* v. *Montgomery County Board of Education*, 395 U.S. 225, 235 (1969). Thus Judge McMillan undertook a detailed and conscientious study, aided by the

skilled and intelligent advice of an unusually capable expert consultant working with the local school administrative staff, to devise "alternatives which may be shown as feasible and more promising in their effectiveness." *Green, supra*, 391 U.S. at 439. The Finger Plan was the product of this study.[63]

Where there is an available plan which will completely desegregate the schools and the board opposes it, "that may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method." *Green, supra* at 439. The board has never sustained the "heavy burden" of opposing the Finger Plan. Indeed, the board has never had any viable legal theory. The board's arguments rest largely on ideological positions against "racial balance" which are premised on a denial of the duty to integrate the schools and are in the teeth of the *Green* decision.

B. *The Court Ordered Plan Is Feasible.*

Petitioners agree with the dissenting judges below that the "feasibility" of a desegregation plan is the proper matter for inquiry. *Green, supra,* indicates that plans must be shown to be "*feasible*" and to "provide *effective* relief" (391 U.S. at 439).

The district court made detailed findings of fact supporting the conclusion that the Finger Plan is feasible and these findings are supported by substantial evidence. It was error for the court of appeals to substitute its own

---

[63] We do not contend that the Finger Plan is the only plan which will satisfy constitutional requirements in Charlotte, nor did the court below. In February, the court ordered the board to implement the Finger Plan or any other plan it might devise which would work (824a-825a). In August, the court specifically approved two other plans which the board could employ if it chose to do so and if the details were completed (Br. A33-34).

opinion that the plan required the board to engage in too much increased bussing where there was no claim that any of the district court's findings on this issue were clearly erroneous. Cf. *Northcross* v. *Board of Education of Memphis*, 397 U.S. 232, 235 (1970). As Judge Sobeloff has shown, in dissent, "there is no genuine dispute" on the feasibility of the plan; it is "simple and quite efficient" (1284a). Here are the facts.[64]

The Finger Plan requires transportation of pupils to accomplish desegregation. The system now transports 23,600 pupils by school bus and another 5,000 by common carrier.[65] The school board's proposed plan would bus about 5,000 additional children,[66] but still would not desegregate the

---

[64] The facts discussed in this section covering the feasibility of the Finger Plan are those that were in the record in the Court of Appeals.

Many of these matters were re-litigated at the hearing in July, 1970. And the significant findings of March, 1970 were reaffirmed (Br. A16-A26).

There were some new findings, all of which support our view that the Finger Plan is feasible. 1) Funds are now available from the State for the operational costs of transportation of *all* city children who live more than 1½ miles from the school to which they are assigned (Br. A11). 2) There are sufficient buses on hand or available on loan so that *no* capital expenditures are required to implement the Finger Plan immediately (Br. A18-A20, A23, A26). 3) Pre-school children are presently bused the greatest distances (Br. A16-A17, A24-A25). 4) There is an ample supply of bus drivers (Br. A21, and see A9). 5) The plan will not cause an unwarranted traffic problem (Br. A25). 6) The board already staggers the opening of schools so that adjusting of the opening and closing hours of particular schools to accommodate the transportation system would be consistent with established practice (Br. A25). 7) The total school budget for 1970-71 is approximately $66,000,000 (Br. A21, A23). Both the county and the state have more than sufficient surplus funds to pay for any conceivable expense which might be occasioned by the Finger Plan (Br. A23).

[65] See 1200a.

[66] See 1219a.

system, leaving 10 Negro schools.[67] The Finger plan by busing about 8,000 more children than the board's proposal (a total of about 13,000 more than at present)[68] will eliminate racial identifiability from every school in the system. The court of appeals affirmed the order as to the secondary students (1,500 senior high and 2,500 junior high pupils), but reversed the requirement as to elementary pupils (9,300 pupils, including 1,300 in schools to be simply rezoned, and 8,000 involved in cross busing between paired schools).[69]

The court carefully considered the busing from the standpoint of the children. The crucial finding is this:

> The court finds that from the standpoint of distance travelled, time en route and inconvenience, the children bussed pursuant to the court order will not as a group travel as far, nor will they experience more inconvenience than the more than 28,000 children who are already being transported at state expense. (1205a)

At present the *average* one-way trip in the system is over 15 miles requiring one hour and fourteen minutes.[70] Eighty percent of the buses in the system require more than one hour for a one-way trip now.[71] The average one-way trip under the court plan "for elementary students is less than seven miles, and would appear to require not over 35 min-

---

[67] The board plan would produce 9 elementary schools 83% to 100% black *serving over half of the entire black elementary population* (826a). In this plan Piedmont Junior High would be 90% black and shifting toward 100% black; segregation would actually increase by 1% more black pupils (830a).

[68] See 1219a.

[69] *Ibid.*

[70] See 1204a, 1215a.

[71] See 1204a.

utes at most, because no stops will be necessary between schools.[72]

The court of appeals ruled that busing is "a permissible tool for achieving integration" and stated that the factors to be considered in appraising busing were "the age of the pupils, the distance and time required for transportation, the effect on traffic, and the cost in relation to the board's resources" (1272a). Only the cost factors seems to have been used to support the court's decision that the elementary school plan involved too much busing. The age of the pupils seems not to have been a decisive factor since busing elementary pupils is an established tradition in Charlotte-Mecklenburg with 10,441 elementary pupils already being bused in 1969-70 (619a). There was no suggestion that the times and distances were decisive since they compared most favorably with the present practice. The average elementary school busing distances under the Finger Plan were shorter than the average trips now made and only a little over half as long as the busing distances approved by the Court of Appeals for the black high school students assigned to Independence High School (1273a).

With respect to the costs of the Finger Plan, we believe that this ground for disapproving the elementary plan is, in Judge Winter's phrase "insubstantial and untenable."[73] The court below states the cost issue in terms of the in-

---

[72] See 1215a. "The average straight line mileage between the elementary schools paired or grounded under the 'cross-bussing' plan is approximately 5½ miles" (1201a). The *trip* mileage was arrived at by the bus superintendent's method of taking straight line mileage and adding 25%."

[73] Indeed, Judge McMillan's recent findings that *no* capital outlay will be required to immediately implement the total court ordered plan (Br. A23) would seem to dispose of the matter entirely.

creased *percentage* of pupils who will be bused. The court recites that the additional elementary pupils who must be bused represent an increase of 39% over all pupils presently bused requiring a 32% increase in the bus fleet (1276a). The court also stated that the added secondary busing which was approved brought the total percentage increases to "pupils 56%, and buses 49%" (*ibid.*). These were the facts recited to support the conclusion that the board "should not be required to undertake such extensive additional busing to discharge its obligation to create a unitary school system" (1276a).

The ruling below does not contain any discussion of the costs of the Finger Plan busing "in relation to the board's resources" but only a discussion of the cost in relation to present expenditures for busing. As we have stated elsewhere in this brief, we do on any account accept the premise that such a monetary consideration should be decisive of important individual rights. All the more does it seem clear that the prior level of expenditures in operating an unconstitutional, segregated system should not be decisive in defining what constitutes a nonsegregated unitary system. But in any event, there is no foundation in this record for a conclusion that the board lacks sufficient resources to implement the Finger Plan. The board's resources are much broader than local funds because in North Carolina transportation costs for school children are largely met by the state board of education, which bears most of the operating costs and also replaces worn out buses after local authorities make the initial purchase. The capital outlay required for the 90 buses needed in the elementary school phase of the Finger Plan will be about $5,400 per bus or $486,000, an investment which will buy not only vehicles with useful lives of up to 15 years, but also the right to have them perpetually replaced at no further cost to the

local board.[74] The State will bear the operational cost of the 90 buses which was found to be $186,000 annually. When these expenditures are considered in the context of the local education budget figures, which exceeded 57 million dollars in 1969-70,[75] and the 3.5 billion dollar state education budget, they are so small as to be insignificant.

Moreover, the discussion of these costs ignore a vital fact. *The State Board of Education, a defendant in this case, already has in its possession a sufficient number of buses to implement the Finger Plan.* The case thus involves merely a decision about whether existing state resources—buses already owned by the defendant State Board of Education—will be used to integrate the Charlotte schools. Judge McMillan found that the State Board of Education had "approximately 400 brand new school busses and 375 used busses in storage, awaiting orders from school boards" (1219a).[76] As Judge McMillan put it:

> The problem is not one of availability of busses but of unwillingness of Mecklenburg to buy them and of the state to furnish or make them available until final decision of this case (1220a).

Since the State Board of Education already owns sufficient used busses in storage to implement the Finger Plan

---

[74] And, of course, none of these vehicles need be bought immediately.

> "No capital outlay will be needed to supply buses for the 1970-71 school year. The state is ready and willing to lend the few busses the board may need; replacements can be bought after actual need has been determined under operating conditions" (Br. A23).

[75] The local budget is approximately $66,000,000 for the 1970-71 school year (Br. A21, A23).

[76] The facts as to availability of busses in July, 1970 are found at Br. A18-A20.

there really is no legitimate issue in this case about the financial burden of the plan. Even if the local board had insufficient money to pay for these busses (which is not true), desegregation may not be defeated on the basis that one agency of the state does not have sufficient funds to reimburse another state agency which has an equal duty to aid in desegregation of the public schools. The appropriate principle was stated in *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958), where the Court unanimously declared that:

> State support of segregated schools through any arrangement, management, funds or property cannot be squared with the Amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws.

It would plainly be within the power of the district court, if it proved necessary, to require the State Board of Education to loan—or even grant—the necessary buses now in storage to the Charlotte-Mecklenburg board. Cf. *Griffin* v. *County School Board*, 377 U.S. 218 (1964), where the Court required that money be levied and spent to redress constitutional rights.

C. *The Finger Plan Utilises Appropriate Techniques to Achieve Pupil Desegregation.*

We believe that the court below was correct in rejecting the board's objections to a variety of desegregation techniques used in the court ordered plan, such as busing to promote integration, creating satellite school zones in noncontiguous areas, and creating paired or clustered schools with altered grade structures. The court below pointed to the direction in *Brown II* about using "practical flexibility" in shaping remedies, as support for use of the satellite zone technique (1247a). *Brown* v. *Board of Education*, 349 U.S.

294, 300 (1955). The court also noted that the pairing and clustering of schools was approved in *Green* v. *County School Bd. of New Kent County,* 391 U.S. 430, 442, n. 6 (1968), and *Hall* v. *St. Helena Parish School Bd.,* 417 F.2d 801, 809 (5th Cir. 1969), *cert. denied,* 396 U.S. 904 (1969). There are a great many other decisions in which courts have required use of pairing and clustering techniques, sometimes necessitating transportation, in order to accomplish desegregation.[77] Adoption of the board's argument would require repudiation of techniques widely employed to accomplish the dismantling of segregated systems.

School bussing is an ordinary tool of educational administration which may properly be employed to desegre-

---

[77] Cases where courts have employed the pairing or clustering technique include: *Nesbit* v. *Statesville City Board of Education,* 418 F.2d 1040, 1042 (4th Cir. 1969) (*en banc*); *Brunson* v. *Board of Trustees of School District No. 1,* No. 14571, —— F.2d —— (4th Cir., June 5, 1970); *Green* v. *School Board of Roanoke,* No. 14335, —— F.2d —— (4th Cir., June 17, 1970); *Brewer* v. *School Board of Norfolk,* No. 14544, —— F.2d —— (4th Cir., June 22, 1970), *cert. den.* 38 U.S.L. Week 3522; *Hall* v. *St. Helena Parish School Board,* 424 F.2d 320 (5th Cir. 1970); *United States* v. *Board of Trustees of Crosby Independent School District,* 424 F.2d 625 (5th Cir. 1970); *Mannings* v. *Board of Public Instruction of Hillsbrough County,* No. 28643, —— F.2d —— (5th Cir., May 11, 1970); *Davis* v. *Board of School Commissioners of Mobile County,* No. 29332, —— F.2d —— (5th Cir., June 5, 1970), cert. pending on other issues, No. 436, O.T. 1970; *Harvest* v. *Board of Public Instruction of Manatee County,* No. 29425, —— F.2d —— (5th Cir., June 26, 1970); *Bradley* v. *Board of Public Instruction of Pinellas County,* No. 28639, —— F.2d —— (5th Cir., July 1, 1970); *Tillman* v. *Board of Public Instruction of Volusia County,* No. 29180, —— F.2d —— (5th Cir., July 21, 1970); *United States* v. *School District 151,* Cook County, Ill., 404 F.2d 1125 (7th Cir, 1968), affirming 286 F.Supp. 786 (N.D. Ill.); *Kemp* v. *Beasley,* 423 F.2d 851, 856 (8th Cir. 1970); and *Jackson* v. *Marvell School District No. 22,* 425 F.2d 211 (8th Cir. 1970).

gat
te the schools.[78] Generalized objections to school busing
to
promote desegregation do not sustain the board's bur-
der
n. Obviously some transportation is necessary in the
sys
stem. It is plainly not a valid objection to busing that it
is
used to promote integration, for this is the constitutional
im
perative. The board has no satisfactory theory to dif-
fer
entiate that busing which is admittedly necessary from
the
at which it finds objectionable, i.e., to legally differenti-
ate
between "good" and "bad" busing.

The board attacks arrangements which involve transport-
ing
children from their zone of residence to a non-adjacent
zone
ne. But pupils have no inherent right to attend any par-
ticular school because of their place of residence. A child's
"o
wn neighborhood school zone" does not exist in the order
of
natural phenomena. It is the product of school board
de
cision, i.e., state action. Attendance areas and the grades
se
rved by particular buildings are always subject to change
and often are changed. There is no good reason not to use
av
ailable transportation facilities to desegregate the
scho
ols, or to limit that transportation to an artificial
"a
djacent" zone. Segregated schools need not inevitably
fo
llow segregated housing patterns. There is nothing in-
ex
orable about such segregation; there is merely the ap-
pearance of inevitabilty. The general case for busing to
promote integration is well stated in "On The Matter of

---

be
[78] Busing to promote desegregation has been approved in a num-
19
er of cases including: *Kemp* v. *Beasley*, 423 F.2d 851 (8th Cir.
ur
970) ("bussing is only one possible tool in the implementation of
of
nitary schools"; per Blackmun, J.); *Clark* v. *Board of Education*
ce
of Little Rock, No. 19795, —— F.2d —— (8th Cir., May 13, 1970),
of
ert. pending No. 409 O.T. 1970; *United States* v. *Board of Trustees*
of Crosby Independent School District, supra; Harvest v. *Board*
of
of Public Instruction of Manatee County, supra; Tillman v. *Board*
of Public Instruction of Volusia County, supra; and *United States*
v. *School District No. 151*, Cook County, Ill., *supra*.

Bussing: A Staff Memorandum from the Center For Urban Education" (February 1970):

> Good education, as well as the moral imperatives of a pluralistic society, demands desegregation of the schools. How can school desegregation be accomplished in cities and suburbs with long-established racial housing patterns? What method can circumvent the hard fact that segregated neighborhoods foster segregated neighborhood schools? One tried and tested means is the transportation of children out of their immediate neighborhoods by school bus.
>
> Riding the yellow school bus is as much a symbol of American education in 1970 as the little red schoolhouse was in 1900. And, until recently, it had conveyed no emotional overtones other than nostalgia for lost youth. In a country as large as ours, neighborhood schools within walking distance are a relatively recent luxury of the cities.
>
> Most children take a bus or car to school. Children in rural areas ride to central schools. Children in suburbia queue up on the corner for the bus that their parents at open school board meetings insist is theirs by right. Private and parochial school pupils board school busses and ride often for half an hour to their destination. In large cities children travel public subways and busses, sometimes more than an hour each way, to special schools of music and art, performing arts, or science. And parents of handicapped children have maintained steady pressures on state legislatures to provide state-supported bussing to schools filling special educational needs. More recently, southern parents have rented their own busses to transport white children to private, segregated schools. In none of these cases have parents complained of harm to their children by the bus ride, or of the expense of the busses.

Transferring children from one school to another is literally a means to an end—the end of the bus ride should be better schooling. In cases where the transfer becomes an end in itself, the results are predictably disappointing. Other things being equal, a child from a racially isolated neighborhood will find an integrated school a better environment for learning than a school in which his classmates are equally isolated. But there is no magic in a bus ride which offsets poor planning, a teacher's dislike or lack of respect for a child, or a disregard of emergency procedures.

The poverty of the board's ideas in its arguments against busing to integrate schools is emphasized by the facts with respect to the current use of busing in Mecklenburg. Many new white schools are located so that few pupils can walk to schools. The walk-in school is basically a phenomenon of the black neighborhoods. Of 17,000 children in black schools, only about 541 are now transported to school (1204a). The white schools have the opposite pattern. For example, in six white high schools and two junior high schools with a total of 12,184 pupils, only 96 students live within the mile and a half walking distance (1203a). Some 12,088 of these pupils are eligible for transportation and 5,349 of them ride the school buses (*id.*). Many pupils use private transportation.

The more one studies the detailed facts with respect to school bus transportation in Charlotte, and the data in the record with respect to such transportation in North Carolina generally, the more it seems clear that the only reason not to use buses to integrate the schools is to keep them segregated.

Judge Sobeloff found the majority's conclusion with respect to the elementary plan so inconsistent with the deci-

sion approving the use of busing, satellite zoning, and similar techniques for secondary students that he said the "decision totally baffles me" (1289a). The major distinction between the busing which is approved and that which is rejected is that the secondary plans primarily increased busing of black students to formerly white schools while the elementary plan requires busing of white children as well as Negroes. We are unlikely to ever end the dual school systems until it becomes accepted that the inconveniences incident to reorganizations of the school systems will not be borne by black pupils alone but will be shared by the white community. Equal protection does require that desegregation plans be generally equitable and not place the entire burden on blacks. Judge McMillan announced at the time he approved the interim plan for 1969-70 that he would not again approve a plan for one-way busing (590a-591a). He wrote that:

> If, as the school superintendent testified, none of the modern, faculty-integrated, expensive, "equal" black schools in the system are suitable for desegregation now, steps can and should be taken to change that condition before the fall of 1970. Unsuitability or inadequacy of a 1970 "black" school to educate 1970 white pupils will not be considered by the court in passing upon plans for 1970 desegregation. (591a)

D. *The Neighborhood School Theory Cannot Be Justified on the Basis of History and Tradition Because It Was Widely Disregarded in Order to Promote Racial Segregation.*

Much of the argument about preserving the neighborhood school and against busing is simply a fake—a spurious attempt to suggest that there is a great traditional right that pupils have always had to go on foot to a nearby

school located conveniently to their homes. That concept has little reality in a state like North Carolina where 54.9 percent of the pupils ride a school bus every day an average trip of 12 miles one way (1199a). The real tradition of North Carolina schools, and other states in the Fourth Circuit, is a tradition not of neighborhood schools, but of separate "white" and "Negro" schools, whether or not the neighborhoods were separate.

It has not been so very many years since the Fourth Circuit solemnly assembled to hear school men attempt to justify busing Negro children not only out of their neighborhoods but out of their counties to segregated all-black schools. These cases give one an interesting perspective about the arguments current now. The following are some busing arrangements revealed in cases in the Fourth Circuit:

1. *Griffin* v. *Board of Education of Yancey County*, 186 F. Supp. 511 (W.D. N.C. 1960). The court found that Negro pupils were being bused every day an 80 mile round trip from Burnsville to Asheville. While the case was pending without any relief, the board finally built a school for the 25 Negroes in Yancey County with a *changed grade structure*: to wit, all 12 grades were taught in two rooms for 25 pupils. Judge Warlick's opinion notes that bus transportation was used extensively throughout the State.

2. *School Board of Warren County, Va.* v. *Kilby*, 259 F.2d 497 (4th Cir. 1958). The school board appealed an order requiring desegregation where some Negro pupils were bused out of the county 25 miles each way and others were bused 50 miles each way to a boarding school where they were required to remain all week and return home on weekends. We repeat: the school board appealed seeking to preserve this arrangement.

3. *Goins* v. *County School Board of Grayson County, Va.*, 186 F. Supp. 753 (W.D. Va. 1960), stay denied, 282 F.2d 343 (4th Cir. 1960). Negro pupils bused 30-40 miles out of their county.

4. *Corbin* v. *County School Board of Pulaski County, Va.*, 177 F.2d 924 (4th Cir. 1949) (bus travels out of county 60 miles per day). Eleven years later, see *Crisp* v. *County School Board of Pulaski County, Va.* (W.D. Va. 1960), 5 Race Rel. L. Rep. 721.

Similar arrangements involving out of county assignments were condemned in *Buckner* v. *County School Board of Greene County, Va.*, 332 F.2d 452 (4th Cir. 1964), and *Walker* v. *County School Board of Floyd County, Va.* (W.D. Va. 1960), 5 Race Rel. L. Rep. 714.

The conception that pupils were entitled to go to their nearest school got short-shrift in the context of the segregated system. Dual overlapping attendance areas within which blacks were often denied access to nearby white facilities were common, *Jones* v. *School Board of Alexandria, Va.*, 278 F.2d 72, 76 (4th Cir. 1960). Also common were "satellite zones" and non-contiguous attendance zones. See, e.g., *Haney* v. *County Board of Education of Sevier County, Ark.*, 410 F.2d 920 (8th Cir. 1969). See, generally, the excellent monograph commissioned by the U.S. Office of Education, Weinberg, "Race and Place, A Legal History of the Neighborhood School" (U.S. Govt. Printing Office, 1967). Weinberg recalls the non-contiguous *satellite zone* in the Arlington County, Virginia case called the "North-Hoffman Boston Zone" which was an all-black satellite zone located a 20 minute bus ride from the school:

> In much-litigated Arlington County, Va., 30 Negro children applied under the State pupil placement law for transfer to a white school. The school board re-

jected 26 of the 30 applications, claiming it based its decision on five criteria: "attendance area, overcrowding at [white] Washington and Lee High School, academic accomplishment, psychological problems, and adaptability."[26] Seven of the students had applied for transfers on the ground that three white schools were nearer to their home. As the court explained: "However, the school authorities had other factors to consider, such as the adoption of presently established school bus routes, walking distances and the crossing of highways, as well as that [all-Negro] Hoffman-Boston was but a 20 minute bus ride for these pupils."[27]

---

[26] *Thompson* v. *County School Board of Arlington County*, 166 F. Supp. 529, 532 (1958).

[27] *Ibid.* at 533.

Of course, current practices in Charlotte-Mecklenburg sanction deviations from the neighborhood school ideal to promote segregation. The district judge disapproved a board request for a modification of the 1969-70 plan saying, "As this court pointed out before, bus transportation has too long been used as a tool to promote segregation. The year 1969 is too late in the day to start using this tool for that purpose in new situations" (595a). The free transfer plan now in effect allowed 1,200 white students to transfer out of their neighborhood schools in black neighborhoods in 1968-69 (453a).

Judge McMillan was right when he ruled: "The neighborhood school theory has no standing to override the Constitution" (300 F. Supp. at 1369; 306a).

E. *The Finger Plan Is Necessary to Accomplish the Constitutional Objective.*

If there was some proposal in the record which would be *equally effective or more effective* in eliminating segrega-

tion, there would be room for discussion about which plan is most desirable. Judge McMillan demonstrated that he was prepared to accept school board alternatives which produced equal results in accomplishing desegregation. He preferred such "home-grown products" even where he believed the expert consultant's proposals were more efficient. But an essential finding which supports the Finger Plan for elementary schools is Judge McMillan's conclusion that it was *necessary* to adopt a plan of this type to accomplish the result of desegregation. The court found:

> Both Dr. Finger and the school board staff appear to have agreed, and the court finds as a fact, that for the present at least, there is no way to desegregate the all-black schools in Northwest Charlotte without providing (or continuing to provide) bus or other transportation for thousands of children. All plans and all variations of plans considered for this purpose lead in one fashion or another to that conclusion. (1208a)

Judge Sobeloff's dissenting opinion noted that "The point has been perceived by the counsel for the board, who have candidly informed us that if the job must be done then the Finger plan is the way to do it" (1282a).

F. *The Court of Appeals Applied an Improper Standard for Appellate Review of the District Court's Discretionary Determination in Formulating Equitable Relief.*

Where the constitutional objective of integration is accomplished a district court's judgments on issues relating to the feasibility of particular local arrangements should not be upset except for plain abuse of discretion. There is, of course, no "discretion" to keep schools segregated. But there must be a substantial area of discretion for trial

judges to make practical judgments about the feasibility of local school desegregation arrangements.

The Finger elementary plan ought to be upheld if the case is governed by the traditional rule for appellate review of a chancellor's decree in equity. The prevailing rule is that equitable discretion in framing remedies is necessarily broad and that a strong showing of abuse of discretion must be made to reverse such a decree. *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953); *Continental Illinois Nat. Bank & Trust Co.* v. *Chicago R. I. & P. R. Co.*, 294 U.S. 648, 677 (1935); *United States* v. *Corrick*, 298 U.S. 435 (1936); *Rogers* v. *Hill*, 289 U.S. 582 (1933). In order to set aside the equity decree the appellant "must demonstrate that there was no reasonable basis for the district judge's decision," and thus that the remedy is so lacking in rationality as to amount to an abuse of discretion. *United States* v. *W. T. Grant Co.*, *supra*, 345 U.S. at 634.

This Court's decisions in school cases have relied on traditional equitable principles on remedial issues. In the second *Brown* decision the Court invoked the tradition of equity which was said to be "characterized by a practical flexibility in shaping its remedies and by a facility for reconciling public and private needs" (349 U.S. at 300). The *Brown II* Court cited with approval a passage in *Alexander* v. *Hillman*, 296 U.S. 222, 239 (1935), stating.

> Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge and properly to enforce substantial rights of all the parties before them.

In *Griffin* v. *School Board*, 377 U.S. 218, 232-233 (1964), the Court said that "relief needs to be quick and effective,"

and that a federal court could require a county to levy taxes if necessary to maintain a non-discriminatory public school system. *Green* v. *County School Board,* 391 U.S. 430, 439 (1968), emphasized that in formulating a remedy district courts were to assess "the circumstances present and the options available in each instance." In *United States* v. *Montgomery County Board of Education,* 395 U.S. 225, 235 (1969), the Court emphasized that "in this field the way must always be left open for experimentation." In the *Montgomery County* case the Court reversed a court of appeals decision which labeled the district judge's order too rigid and inflexible in favor of the trial court's "more specific and expeditious order."

There is nothing in this development of school desegregation law since *Brown* which warrants the departure announced by the plurality opinion of Judge Butzner for the court below from the traditional rule of appellate review. This new test of "reasonableness" enables the reviewing court to set aside the trial court's discretion on the ground that the appeals court majority would prefer another mode of relief albeit less effective. This runs exactly counter to the spirit of *Green* which declares that the result—actual desegregation—is the imperative thing and that the methodology of desegregation plans is secondary. It also runs counter to the philosophy of *Alexander, Carter* and *Dowell, supra,* which place a premium on the immediate implementation of constitutional rights pending the completion of litigation. The reasonableness test allows so much scope for unpredictable reversals of those decrees which accomplish actual desegregation as to substantially nullify *Alexander.* The reasonableness test signals the need for trial courts to adopt a "go-slow" cautious approach. Although busing is approved in principle in the opinion below, the result makes it clear that busing must be

limited. The standard of "reasonableness" is broad and vague, but it does not allow broad discretion for trial courts to order busing. Any plan found objectionable by a school board can colorably be said to be "unreasonable" justifying at least a stay pending appeal. The "reasonableness" test is "deliberate speed" in a new guise.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed and the judgment of the district court reinstated with directions that the desegregation of the schools proceed forthwith.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
10 Columbus Circle
New York, N. Y. 10019

J. LEVONNE CHAMBERS
ADAM STEIN
CHAMBERS, STEIN, FERGUSON & LANNING
216 West Tenth Street
Charlotte, N. C. 28202

C. O. PEARSON
203½ East Chapel Hill Street
Durham, N. C. 27702

Attorneys for Petitioners

APPENDIX

Memorandum of Decision and Order, dated August 3, 1970

I.

Summary

Pursuant to the mandates of the Supreme Court of the United States and the Fourth Circuit Court of Appeals, further hearings (eight days of them) have been conducted July 15-24, 1970, regarding methods for desegregation of the public schools of Charlotte and Mecklenburg County, North Carolina, and the known plans for desegregation of the elementary schools have been reconsidered.

The Court again finds as a fact that compliance with all parts of the desegregation order for senior high, junior high and elementary schools now in effect will require, at the most, transportation of 13,300 children on 138 busses.

The elementary portion of the order will require, at the most, transporting 9,300 children on 90 buses. The defendants already own or control at least 80 safely operable busses not in use on regular routes, *and* they expect early delivery of 28 more new ones. Such buses as may be needed beyond these 108 can be borrowed for a year without cost from the State.

No capital outlay will be required this year to comply with the court's order. The School Board and the county government have ample surplus and other funds on hand to replace with new busses as many of the used buses as 1970-71 experience may show they actually need. If they have to buy 120 new ones, at $5,500 each, the cost will approach $660,000, which is less than the cost of two days' operation of the schools.

Memorandum of Decision and Order, dated August 3, 1970

Regardless of any order of this court, all children assigned to any school more than 1½ miles from home are, under state law and regulation, now entitled to bus transport.

The 5/4 School Board majority have not obeyed the orders of the Circuit Court to prepare a new plan for elementary schools in place of their rejected plan. The court ordered plan for all schools has been in effect since June 29, 1970 under the mandate of the Supreme Court.

The School Board has not used all reasonable means to desegregate the elementary schools.

At least three reasonable plans are available to the Board: (1) the court ordered (Finger) plan; (2) the 4/5 minority Board ("Watkins") plan; and (3) an earlier draft of the Finger plan.

The Circuit Court directed this court to have a plan in effect for the opening of schools in the fall, and the Supreme Court on June 29, 1970 put this court's February 5 order back into effect pending these proceedings. The court ordered (Finger) plan is the only complete plan before the court, and it is a reasonable plan. The Board is herein directed to put the court ordered plan (with authorized modifications, if desired) into effect with the opening of school in the fall, unless they exercise the options set out herein to adopt the 4/5 minority Board plan (the "Watkins" plan) or an earlier draft of the Finger plan, or any combination of these three plus excerpts from the HEW plan, which complies with the directives in the February 5 order. The Board is directed to notify the court in writing by noon on August 7, 1970, as to the course of action which it has voted to follow.

Board plans for desegregation of the faculties of all schools and of the student bodies of the senior high schools and the junior high schools are approved.

Memorandum of Decision and Order, dated August 3, 1970

II.

Brief History of Proceedings.

On April 23, 1969, after lengthy hearings and research, an order was entered that the defendants submit a plan for the desegregation of the schools of Charlotte and Mecklenburg County, North Carolina, to be predominantly effective in the fall of 1969, and to be completed by the fall of 1970. Among other things the court found that under North Carolina law there is no "freedom of choice" to attend any school; that the Board of Education has the total control over the assignment of students to schools; and that residence has never created a right to attend a particular school. It was further found that all the black and predominantly black schools of this school system are illegally segregated. The November 7, 1969 opinion contained detailed guidelines for desegregating this particular group of schools, and included the following findings:

> "The black schools are for the most part in black residential areas. However, that does not make their segregation constitutionally benign. In previous opinions the facts respecting their *locations*, their *controlled size* and their *population* have already been found. Briefly summarized, these facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land;

> zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods. There is so much state action embedded in and shaping these events that the resulting segregation is not innocent or *"de facto,"* and the resulting schools are not "unitary" or "desegregated."

Segregation of black children into black schools is *not* because of residential patterns, but because of assignment and other policies of the School Board, including the call upon segregated housing and school site selection to lend respectability to those policies.

(There is attached hereto an 18-page exhibit listing approximately 65 sections of the General Statutes of North Carolina and 2 sections of its Constitution under which the segregation of the black race in North Carolina has been the policy of our Constitution and the letter of our statutes for many years. Many of these provisions were repealed by the 1969 General Assembly, but most of them were still on the books when the April 23, 1969 opinion was written.) [The exhibit referred to is not printed herein.]

A consultant, Dr. John A. Finger, Jr., was appointed by the court in December, 1969, to draw a desegregation plan after it became apparent that the defendants had no such plan and had not resolved to prepare one which would desegregate the schools. The development of the plan is described in the order of February 5, 1970, the supplemental historical memorandum of March 21, 1970, and the supple-

mental findings of fact dated March 21, 1970. Briefly stated, the court-appointed consultant prepared plans for the desegregation of all the black schools. Faced with the imminent existence of valid desegregation plans, the Board then went to work and prepared some plans of its own.

This court approved the Board's plan for senior high schools (with one minor change); it gave the School Board a choice of several plans or procedures as to junior high schools; and it disapproved the Board's plan for elementary schools, because it left half the black children in black schools, and ordered into effect one of the plans designed by the consultant, Dr. Finger, for desegregation of the elementary schools.

The Circuit Court of Appeals granted a stay as to the elementary schools and the Supreme Court left the stay in effect. The district court then, in the order of March 25, 1970, postponed until September 1, 1970, the implementation of the plans for junior and senior high schools because the stays issued by the Circuit Court and the Supreme Court had taken off the pressure for mid-year 1969-70 desegregation.

Before the appeal to the Fourth Circuit was concluded, the defendants, including the Governor and the State Board of Education, voiced strenuous opposition to compliance with the court order, basing their objections in part upon parts of the 1964 Civil Rights Law and upon North Carolina's "anti-bussing law" which had been passed by the General Assembly a few weeks after this court's original April 23, 1969 order. A three-judge court was convened and has met and has decided that the "anti-bussing law" in pertinent part is unconstitutional, and eventually issued appropriate injunctions.

The Circuit Court of Appeals then issued its opinion on May 26, 1970. It affirmed the principal findings of fact and legal conclusions of the district court, including the finding that the segregated residential housing upon which the defendants relied for defense was caused by forces deriving their basic strength from governmental action. It (1) approved the desegregation of faculties, (2) approved the plans for desegregation of junior high schools, and (3) approved the plans for desegregation of senior high schools all as ordered by the district court. It expressly *dis*approved the Board's plan for elementary schools because it left half the black elementary children in "black" schools, and it remanded the matter for the school board to prepare a new plan using all reasonable means of desegregation, and for the district court to reconsider the assignment of elementary pupils under a theory of "reasonableness". The district court was directed to put a plan into effect for the fall term 1970.

The Supreme Court on June 29, 1970, entered an order reading in pertinent part as follows:

> ". . . The petition for a writ of certiorari is granted, provided that the judgment of the Court of Appeals is left undisturbed insofar as it remands the case to the district court for further proceedings, which further proceedings are authorized, and the district court's judgment is reinstated and shall remain in effect pending those proceedings."

At the July 15-July 24 hearings the defendants announced that:

> (a) Faculties have been assigned for all schools according to the February 5, 1970 order, so that when

schools open in September all faculties will have about 75% white teachers and about 25% black teachers;

(b) The senior high schools will be desegregated this fall in accordance with the plan previously approved by the district court and by the Circuit Court;

(c) The junior high schools will be desegregated this fall in accordance with the plan previously approved by the district court and by the Circuit Court; and

(d) As to elementary schools the majority of the defendants have no official plan and no plan of action for desegregation except the plan, previously rejected by both district court and the Circuit Court, which would leave half the black elementary children in segregated schools.

Since the school board has refused to obey the Circuit Court's instructions to file a new elementary plan by June 30, 1970, it might, were this an ordinary case, have no standing to be heard further. However, the case affects numerous people who, though not Board members, are entitled to have the matter further considered as fully and fairly as possible.

This court has tried to follow faithfully the orders of the Supreme Court and the Circuit Court. This presents some unique problems; the Circuit Court's "reasonableness" order is vague; the Supreme Court's order allowing certiorari is cryptic, and raises and leaves unanswered several major questions; neither order is a clear guide for this court. However, this court believes that, regardless of the Board's continued default, this court's duty is to reconsider the elementary desegregation problem in view of

the questions whether the methods previously required by the court are reasonable and whether the Board has exhausted all reasonable methods available to it.

III.

The Extent of Continued Segregation—And Its Results.

The schools are still segregated as described in this court's memorandum opinion of November 7, 1969. Over 9,000 black children attend schools that are 100% black. Two-thirds (16,000) of the black children still attend racially identifiable "black" schools. Fifty-seven schools are "white" and twenty-five are predominantly "black."

The tangible results of segregation continue to be apparent from the 1969-70 Stanford Achievement Tests in Paragraph Meaning and Arithmetic, given during the sixth month of school, for grades 3, 6, 8 and 10. In "black" schools third graders perform at first grade or early second grade levels, while their contemporaries at "white" schools perform at levels generally from one to two grades higher. Sixth graders in the black schools (Double Oaks and Bruns Avenue, for example) perform at third grade levels while their contemporaries at Olde Providence, Pinewood, Lansdowne and Myers Park perform at seventh or eighth grade levels. In the eighth grade we see Piedmont Junior High students reading at early fifth grade levels while their contemporaries at McClintock and Alexander Graham read at early ninth grade levels. In the tenth grade, on a scale where the *average* is 50, the black high school, West Charlotte, had English scores of 38.30 and mathematics scores of 35.89; Harding, nearly half black, had scores of 42.89 and 40.76; while the obviously "white" schools had scores ranging from 43.2 to 52.2. At First Ward Elementary

School only two black *third* graders out of 119 tested scored as high as third grade, while 100 were still at first grade level of proficiency as to paragraph meaning.

Of factors affecting educational progress of black children, segregation appears to be *the factor under control of the state* which still constitutes the greatest deterrent to achievement.

IV.

The Legal Basis For Desegregation.

A. *Segregated public schools are unconstitutional.*—Desegregation is based on the Constitution as interpreted in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), where the Supreme Court said:

> "'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. *Segregation with the sanction of law, therefore, has a tendency to* [*retard*] *the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial*[*ly*] *integrated school system.*'
>
> • • •
>
> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. *Separate educational facilities are inherently unequal.* . . . ." (Emphasis added.)

Memorandum of Decision and Order, dated August 3, 1970

Green v. *New Kent County*, 391 U.S. 430 (1968) placed upon school boards the burden

> ". . . to come forward with a plan that promises realistically to work, and promises realistically to work *now*," [and]
>
> ". . .to convert promptly to a system without a 'white' school and a 'Negro' school, *but just schools*." (Emphasis added.)

The principal difference between New Kent County, Virginia, and Mecklenburg County, North Carolina, is that in New Kent County the number of children being denied access to equal education was only 740, whereas in Mecklenburg that number exceeds 16,000. If *Brown* and *New Kent County* and *Griffin* v. *Prince Edward County* and *Alexander* v. *Holmes County* are confined to small counties and to "easy" situations, the constitutional right is indeed an illusory one. A black child in urban Charlotte whose education is being crippled by unlawful segregation is just as much entitled to relief as his contemporary on a Virginia farm.

B. *"Racial balance" is not required by this court.*—The November 7, 1969 order expressly contemplated wide variations in permissible school population; and the February 5, 1970 order approved plans for the schools with pupil populations varying from 3% at Bain Elementary to 41% at Cornelius. This is not racial balance but racial diversity. The purpose is not some fictitious "mix", but the compliance of this school system with the Constitution by eliminating the racial characteristics of its schools.

C. *"Bussing" is still an irrelevant issue.*—Until the end of the 1969-70 school year, state law and regulations au-

thorized bus transportation for almost all public school children who lived more than 1½ miles from the school to which they were assigned. The excluded few were those inner-city children who both lived and attended school within the old (pre-1957) city limits.

If an inner-city child was assigned to a suburban or a rural school, or if a rural or suburban child was assigned to an inner-city school, he *was* entitled to bus transport.

Under those regulations, virtually all the children covered by the court order of February 5, 1970, were entitled to bus transport under *then existing* state regulations *even if the order of this court had not mentioned transportation.*

In *Sparrow* v. *Gill*, 304 F.Supp. 86 (1969), a three-judge federal court ordered an end to the discrimination against the inner-city children (and thereby in effect ordered bus transport for those children) by requiring the school authorities to discontinue transport for suburban children unless they also offered it to inner-city children.

The state authorities have announced intention and promulgated rules to comply with this decision by providing transport on the usual basis for *all* city children who live over 1½ miles from school.

The local School Board, in its last plan for partial elementary desegregation, stated that

> "Transportation will be provided to and from school for all students who are entitled thereto under state law and applicable rules and regulations promulgated by the State."

(Without such transportation even the Board's own plan would have left children, in numbers they estimate at nearly 5,000, assigned to schools too far away to reach.)

Memorandum of Decision and Order, dated August 3, 1970

In view of the above facts, every child assigned to any school over 1½ miles from his home is entitled to bus transportation in North Carolina.

The issue is not, "Shall we bus children?" but "Shall we *withhold* transportation already available?"

In *Griffin* v. *Prince Edward County*, 377 U.S. 218 (1964), the Supreme Court held that a county could be required to recreate an entire public school system rather than keep it closed to avoid desegregation. The same principle would seem to apply here.

D. *This is a local case in a local court—a lawsuit—to test the constitutional rights of local people.*—The *principles* which outlaw racial discrimination in public schools certainly are of nationwide application, but the *facts* and results may vary from case to case. This is a local suit involving actions of the State of North Carolina and its local governments and agencies. The facts about the development of black Charlotte may not be the facts of the development of black Chicago or black Denver or New York or Baltimore. Some other court will have to pass on that problem. The decision of the case involves local history, local statutes, local geography, local demography, local state history including half a century of bus transportation, local zoning, local school boards—in other words, local and individual merits.

This court has not ruled, and does not rule that "racial balance" is required under the Constitution; nor that all black schools in all cities are unlawful; nor that all school boards must bus children or violate the Constitution; *nor that the particular order entered in this case would be correct in other circumstances not before this court.*

The orders of this court have been confined to the only area they can properly embrace, and that is *the rights of*

the particular parties represented in this case, on the particular facts and history of this case.

E. *The issue is not the validity of a "system", but the rights of* INDIVIDUAL PEOPLE.—If the rights of citizens are infringed by the system, the infringement is not excused because in the abstract the system may appear valid. "Separate but equal" for a long time was thought to be a valid system but when it was finally admitted that individual rights were denied by the valid system, the system gave way to the rights of individuals.

F. *The Issue Is One Of Constitutional Law—Not Politics.*—At the hearings the defendants offered public opinion polls and testimony that parents don't like "bussing," and that this attitude produces an adverse educational effect upon the minds of the children. The court has excluded such evidence, and must continue to proceed unaffected, if possible, by this and other types of political pressure and public opinion.

This is not out of disregard for the opinions of neighbors. A judge would ordinarily like to decide cases to suit his neighbors. Furthermore, as first suggested on August 15, 1969, it may well be that if the people of the community understood the facts, as the court has been required to learn and understand them, they would reach about the same conclusions the court has reached.

To yield to public clamor, however, is to corrupt the judicial process and to turn the effective operation of courts over to political activism and to the temporary local opinion makers. This a court must not do.

In the long run, it is true, a majority of the people will have their way. The majority must be a majority of the pertinent voting group. As our slave-owning grandfathers

of the South learned in 1865, the pertinent voting group on constitutional matters includes the people and their elected representatives from the nation at large, not just the South, and not just Mecklenburg County. Methods exist to amend the Constitution. If the Constitution is amended or the higher courts rule so as to allow continued segregation in the local public schools, this court will have to be governed by such amendment or decisions. In the meanwhile, the duty of this and other courts is to seek to follow the Constitution in the light of the existing rulings of the Supreme Court, and under the belief that the constitutional rights of people should not be swept away by temporary local or national public opinion or political manipulation.

Civil rights are seldom threatened except by majorities. One whose actions reflect accepted local opinion seldom needs to call upon the Constitution. It is axiomatic that persons claiming constitutional protection are often, for the time being, out of phase with the accepted "right" thinking of their local community. If in such circumstances courts look to public opinion or to political intervention by any other branch of the government instead of to the more stable bulwarks of the Constitution itself, we lose our government of laws and are back to the government of man, unfettered by law, which our forefathers sought to avoid.

Lord Edward Coke, Chief Justice of the Court of Common Pleas of England, may have summed it up when in 1616 he wrote, responding to a peremptory demand from the King's attorney general, that he must deny the King's request because under his oath his obligation was that he

> "... shall not delay any person of common right for the letters of the King or of any person nor for any other cause ...."

G. *The duty to desegregate schools does not depend upon the Coleman report, nor an any particular racial proportion of students.*—The essence of the *Brown* decision is that segregation implies inferiority, reduces incentive, reduces morale, reduces opportunity for association and breadth of experience, and that the segregated education itself is inherently unequal. The tests which show the poor performance of segregated children are evidence showing one result of segregation. Segregation would not become lawful, however, if all children scored equally on the tests.

Nor does the validity of *Brown* depend upon whether the system contains ideal proportions of black and white students. The Charlotte-Mecklenburg system does contain a theoretical "ideal" 70-30 proportion of white and black students. This has some bearing upon the reasonableness of any particular local plan or part of such plan. However, it does not give rise to any legitimate contention that *Brown* may be ignored where you cannot have at least 60% or 70% white children in a school. The HEW plan providing for 57% black students in a group of schools may well be constitutional in some other system, though unconstitutional in Mecklenburg where a school 57% black is immediately racially identifiable as a "black" school.

V.

The Reasonableness of the Specific Methods and the Overall Plans Available to Desegregate the Black Charlotte Schools.

A. *The facts under which any question of "reasonableness" must be judged.*—From the lengthy and largely repetitious testimony at the July 15-24 hearings, and from previous evidence, the following facts bearing on "reasonableness" are found:

Memorandum of Decision and Order, dated August 3, 1970

1. In North Carolina the school bus has been used for half a century to transport children to *segregated consolidated* schools. Last year 610,000 children, comprising nearly 55% of the state's public school population, were transported daily on school busses. With the 1970 extension of transportation to inner-city children, the average daily school bus population of North Carolina this September will reach perhaps three-fifths of all public school children. Those eligible for transport are far more numerous. The "anti-bussing law" has been held unconstitutional.

2. Some 70.9% of these bussed children are in the first eight grades. There may be more first graders than children of any other age riding school busses.

3. The academic achievement tests quoted in this and previous orders show that the later desegregation is postponed in this school district the greater the academic penalties are for the black children. By the sixth grade the performance gap is several grades wide. By the eighth grade it may be four grades wide.

4. School bus transportation is safer than any other form of transportation for school children.

5. The defendants have come forward with no program nor intelligible description of "compensatory education," and they advance no theory by which segregated schools can be made equal to unsegregated schools.

6. In Charlotte-Mecklenburg approximately 23,300 children in grades one through twelve (plus more than 700 kindergarten children, ages four and five) ride some 280 schools busses to school every day. The school bus routes for the four and five years olds vary from seven miles to thirty-nine miles, one way. The average one way bus route

in the system today is about an hour and fifteen minutes. Average daily bus travel exceeds forty miles.

7. Approximately 5,000 children of all ages rode public transportation (City Coach Company) every day of the 1969-70 school year at reduced fares, or 20¢ a day (10¢ each trip).

8. The State Department of Public Instruction has announced that it will pay for transportation of children on city bus systems or by other contract carriers at whatever rate may be approved by the North Carolina Utilities Commission. City Coach Company has requested a fare increase. City Coach has indicated a capacity to transport between 6,000 and 7,000 pupils daily if they get fares and routes satisfactorily established.

9. There are only two adult male drivers out of some two hundred and eighty regular bus drivers who drove school busses during the 1969-70 school year, and only about seventeen adult women who drove kindergarten school busses during that year. The other 260-plus drivers are boys and girls, 16, 17 and 18 years old.

10. There is no black residential area in this school system which is so large that the students can not be afforded a desegregated education by reasonable means. The additional length of travel required to implement the best available plans for desegregating the system is less than the average distance of bus transportation now being provided elementary children under existing bus practices, and the travel times are less than times required by existing bus routes.

11. The offer of transportation to encourage "freedom of choice" is ineffectual. It was expressly ordered by this court on April 23, 1969, and put into effect by the defendants in the fall of 1969; and it has had no substantial effect upon the exercise by black children of freedom of choice to go to white schools.

12. There is no "intractable remnant of segregation" in this school system. No part of the system is cut off from the rest of it, and there is no reasonable way to decide what remnant shall be deemed intractable.

13. The regular bus routes are about 280 in number, including 17 bus routes transporting four and five-year-old children to child development centers (kindergartens).

14. Up until the July 15, 1970 hearings, the defendants had allowed the court to believe they only had 280 buses plus a few spares. On the last day of the hearing, however (July 24, 1970), some amazing testimony was developed on cross-examination of the witness J. W. Harrison, the Transportation Superintendent. He testified and the court finds as facts that *in addition to* the 280 "regular" busses, the Board's bus assets include at least the following:

(i)	Spare buses	20
(ii)	Activity buses (each driven less than 1,000 miles a year)	29
(iii)	Used buses replaced by new ones in 1969-70	30
(iv)	New buses currently scheduled for replacement purposes and expected to be delivered in near future	28
	Total:	107

15. It only requires, at the most, 138 busses to implement the court ordered plans for desegregation of all the high schools, junior high schools, and elementary schools in the county!

16. In addition to this, the State school Bus Transportation Department informed the local defendants in early 1970 that there were 75 new busses available to the local school system if they wanted them, out of the 400 new buses then held by the State.

17. As of July 18, 1970, it was stipulated that the State Board of Education had 105 new busses on hand and 655 new ones on order, of which some 289 had been manufactured.

18. It was stipulated that by September 1st the State Department of Education would have approximately 400 secondhand busses on hand and available on loan, without cost, for local school boards to use in 1970-71.

19. According to Defendants' Exhibit 35, a letter of July 10, 1970 from the State Superintendent of Public Instruction to the Superintendent of the Charlotte-Mecklenburg school system:

> "At the present time approximately 400 discarded busses are available at various school garages in the state *that could safely be used, if necessary,* on a temporary basis for the transportation of additional children." (Page 4) (Emphasis added.)
>
> "In the event discarded busses must be used on a temporary basis the state will expect a local school unit to replace the discarded bus pressed back into service

as early as possible and at least by the beginning of the following fiscal year." (Page 6)

• • •

"We would request school units that hold title to these [old] *busses to transfer the title without cost to the school unit needing to use these vehicles on a temporary basis."* (Page 6) (Emphasis added.)

• • •

"It would be the responsibility of the school unit requesting temporary use of old busses to put the old busses in good mechanical repair after they receive delivery of the bus." (Page 7)

20. The testimony of Mr. Harrison was that for a 54-passenger bus a set of new tires, if needed, would cost $324; a complete overhaul of the brakes with replacement of all rubber parts and working parts would cost about $25. (Mechanics are paid on a salary, not a commission, basis.)

21. The brakes, tires, lights and steering on any second-hand bus which might be put into service can be put into first-class safety condition for a figure per bus not exceeding $500. In the case of the busses already on hand in the Charlotte-Mecklenburg system, this cost should be less because the local system has an excellent preventive maintenance and parts replacement program and according to the transportation superintendent anticipates and makes repairs before trouble develops, rather than wait for breakdowns, so that the old rolling stock as well as the new is kept in good condition.

22. The transportation superintendent, Mr. Harrison, testified that he maintains, and now has, a manpower reserve of about 100 students who are qualified and available as school bus drivers, over and above the 280-odd regular drivers. More are now being trained.

23. The estimated school budget for the year 1970-71 is approximately $66,000,000, which is $8,000,000 more than the 1969-70 budget.

24. Of this $66,000,000 the amount of approximately $21,900,000 was allocated to the School Board by the county without restriction as to its use, and the School Board is free to use whatever part of it they find necessary to comply with court orders. (Blaisdell testimony.)

25. The Board's opinion evidence, including numerous exhibits, on numbers of pupils to be transported and numbers of extra busses required (526 for the entire system, 293 for elementary schools) can not be taken seriously. The pupil count was made by counting all pupils in each zone who live more than a mile and a *quarter* (not a mile and a *half*) from each school, and (with some minor but unspecified adjustments) treating all of these children as requiring transportation. This method fails to account for several factors such as (1) the 7% who are absent every day; (2) the pupils now riding City Coach busses; (3) the pupils now already receiving school bus transport; (4) those who go to school in private vehicles.

Moreover, by cutting the "walking distance" from the statutory figure of 1½ miles to 1¼ miles, the Board method reduces by 40% (from over seven square miles to just over five square miles) the area of the walking zone and thereby sharply increases those eligible for bus transport.

Memorandum of Decision and Order, dated August 3, 1970

In computing needed busses, the Board figures unwarrantedly assume: (1) that each bus can make only one round trip a day instead of the average of 1.8 round trips a day now made; (2) that each bus can only transport 46 pupils a day instead of the present average of 84.4; (3) that busses used in the desegregation program must be less efficient than the others.

All these assumptions are contrary to the evidence which, for example, shows that one "desegregation" bus (Bus #23, Exhibit 54) transported 99 children daily among schools as remote as Northwest Charlotte (9th and Bethune) on the one hand and Sharon Elementary and Beverly Woods Elementary, and Quail Hollow Junior High on the other, with the driver then going on in the bus to South High School.

The court's previous findings on these items are reaffirmed. Maximum numbers of pupils to be transported and additional busses needed, even if *Sparrow* v. *Gill* were not in the picture, remain:

	No. Pupils	*No. Busses*
Senior High	1,500	20
Junior High	2,500	28
Elementary	9,300	90
	13,300	138

(Board witnesses after refining lines and making actual pupil assignments now say that the number of senior high pupils requiring transportation is 1,815 and the number of junior high pupils requiring transportation is 2,286.)

26. All plans which desegregate all the schools will require transporting approximately the same number of children. In overall cost, if a zone pupil assignment method is adopted, the minority Board plan may be a little cheaper than the Finger plan.

27. Mecklenburg County had a July 31, 1970 surplus or "carry-forward" of approximately four million dollars, of which one million dollars are completely free of any allocation or budgeting commitment.

28. North Carolina, whose biennial 1969-71 budget is $3,590,902,142.00, regularly has a biennial surplus of many millions of dollars.

29. The annual cost of pupil transportation is approximately $20 a year per pupil; the state pays it all, except for certain minor local administrative costs, and the original purchase of the first bus for a route; thereafter, the state replaces the bus periodically. Earlier findings that the cost was $40 per pupil year were in error.

30. No capital outlay will be needed to supply busses for the 1970-71 school year. The state is ready and willing to lend the few busses the Board may need; replacements can be bought after actual need has been determined under operating conditions.

31. The $66,000,000 school budget amounts to about $366,667 a day for a 180-day school year. If the county eventually has to buy as many as 120 new busses, their cost, at $5,500 each, would be $660,000, which is less than the cost ($733,000) of two days of school operation.

32. *Age of children* has apparently never prevented their school bus transportation. There are, of course, more children between kindergarten and the sixth grade than there are in the higher grades when the dropout rate increases, and more elementary children, including first graders, receive transportation than do high schoolers.

The longest bus routes in the entire county are the routes by which four and five-year-old kindergarten children are transported to child development centers (see Principals' Monthly Bus Report, Defendants' Exhibit 63). The Pineville Child Development Center has one bus, No. 297, which travels over 79 miles a day on one round trip with four and five-year-old children. Another such trip is over 70 miles a day. The Davidson Child Development Center has five busses which travel from 48 to 60 miles a day on one round trip with five-year-old children. The Bain Elementary School has a bus route, No. 115, which travels over 61 miles on one round trip each day, requiring two hours in the morning and two hours in the afternoon with elementary children. Routes to numerous elementary schools are very long in miles and time. The more than 10,000 children in grades one through six who have been riding school busses all these years and who now ride at an average travel time of an hour and a quarter each way are not shown to have had their education damaged by the experience.

Educationally it appears unreasonable to postpone desegregation of small children until later grades. The only concrete evidence of an educational nature in the whole hearing which rose above the level of opinion is the Stanford Achievement Tests which show that the performance gap, which is ordinarily noticeable in the first grade, has become several grades wide by the time the segregated

black child reaches the sixth grade. The lasting effects of segregation are minimized if it is eliminated at an early age.

33. *Traffic problems.*—The county has over 160,000 passenger vehicles and nearly 30,000 trucks registered in it. It is estimated that the total number of automobile trips in the county daily other than truck trips is over 869,000. Traffic is heavy in most parts of the county. Since the so-called "cross-bussing" of the Finger plan or the minority plan will not contemplate pick up and discharge of pupils in the central business area, the busses added by the Finger plan or the minority Board plan will provide very little interference with normal flow of traffic. School busses are no wider than other busses (the law requires that this be so); they already use all the major streets and traffic arteries in the county and city every school morning of the year. There is no evidence to show that adding 138 school busses to the volume of existing traffic will provide any such impediment as should be measured against the constitutional rights of children. It would also appear that a school bus transporting 40 to 75 children should reduce traffic problems by cutting down on the number of automobiles that parents might otherwise be driving over the same roads.

34. The schools already operate on staggered schedules. Today, the opening and closing of schools and the class hours of school bus drivers are adjusted to serve the practical requirements of transportation. Plaintiffs' Exhibit 12 shows that the elementary schools already operate on a staggered opening and closing schedule. Some open at 8:00; some at 8:05; some at 8:10; some at 8:15; some at 8:25 and

some at 8:30 and 8:45 in the morning, and the schools close for grades one and two at hours including 1:30; 1:35; 2:00; 2:15; 2:30; 2:45; 3:00; 3:05 and 3:10. The court finds that staggered opening and closing hours for elementary schools, and arrangement of class schedules of bus drivers for late arrival and early departure are facts of life which will not be eliminated by desegregation of the schools.

35. The defendants have plenty of money, plenty of know-how, plenty of busses on hand or available upon request, and plenty of capacity to implement the court ordered plan or the minority plan or any combination of the various plans. Their contentions to the contrary, and their five million dollar "estimates," when heard against the actual facts, border on fantasy![*]

B. *Reasonableness of methods.*—"Reasonable" is variously defined in more than 1,000 words in Webster's *Unabridged Dictionary*. In the context, the most appropriate definition seems to come from Black's *Law Dictionary*: "Reasonable. Just; proper. Ordinary or usual. *Fit and appropriate to the end in view.*" (Emphasis added.)

The end in view is the desegregation of the schools. The methods available include the following: (1) consolidation of schools (which began fifty years or more ago) and for which the school bus has been the "ordinary or usual," as well as the necessary tool; (2) assignment of pupils;

---

[*] "There was a table set out under a tree in front of the house, and the March Hare and the Hatter were having tea at it.... The table was a large one, but the three were all crowded together at one corner of it. 'No room! No room!' they cried out when they saw Alice coming. 'There's *plenty* of room!' said Alice indignantly, and she sat down in a large arm-chair at one end of the table." (Lewis Carroll, *Alice's Adventures in Wonderland*.)

(3) school bussing; (4) non-contiguous zoning (before *Brown*, no black child was allowed to attend the nearest school if it happened to be white); (5) restructuring of grades in schools; (6) rezoning; (7) pairing, clustering and grouping of schools; (8) use of satellite zones; (9) freedom of choice, with appropriate restrictions; and (10) closing of schools.

All of these methods have been approved as legal by the Fourth Circuit Court of Appeals and by other courts. They work; singly and in combination they can work to accomplish the reassignment of children to eliminate segregation. If they are legal, and if they accomplish the end in view, and if they have been in use for half a century, they certainly qualify as "reasonable" methods. They are "appropriate to the end in view"; they desegregate the schools in a practical way.

C. *The various plans.*—

1. *The 5/4 Majority Board Plan.*—The original Board plan was rejected by this court and by the Circuit Court. The School Board has not obeyed the order of the Circuit Court of Appeals to file a new plan, and has not drafted nor attempted to draft another plan. The Board majority have not explored other methods of desegregation as directed by the Circuit Curt (pairing, clustering, grouping, non-contiguous zoning, re-arranging grade structures), except to discuss these matters among themselves and to offer lengthy testimony rationalizing the non-use of alternative methods. Although parts of the disapproved Board plan could be used in a current plan, the Board plan as originally proposed is still inadequate because it leaves half the black elementary students still attending black schools. The court does not find it to be reasonable.

2. *The HEW plan.*—This plan proposes to adopt the basic zoning program of parts of the Board majority plan, and then to re-zone some of the black schools with some white schools, mostly in low and middle income areas, and by clustering, pairing, grouping and transportation, to produce a substantial desegregation of most of the black schools. The faults of the plan are obvious. It leaves two schools (Double Oaks and Oaklawn) completely black; it leaves more than a score of other schools completely white; it would withdraw from numerous white schools the black students who were transported to those schools during the 1969-70 school year. The clusters proposed by HEW would for the most part continue to be thought of as "black" in this county because the school populations of most of the clusters would vary from 50% to 57% black and the lowest black percentage in any cluster is 36%. Recommended HEW faculty assignments to these clusters of schools contemplated faculties which in the main would be less than half white, and this would be another retrogression from the arrangements already made by the School Board for the fall term! Contrary to orders of the district court and the Circuit Court, the HEW people limited their zoning to contiguous areas.

All witnesses except the HEW representatives themselves joined in hearty criticism of the HEW plan because of its ignorance of local problems, because of its threat of resegregation, and because it tends to concentrate upon the black and low-or middle-income community a race problem that is county wide.

In other days and other places the HEW plan would have looked good; and in those districts where black students are in the majority, much of such a plan could well be reasonable today. However, "reasonableness" has to be

measured in the context; and in this context the HEW plan does not pass muster. It also on the facts of this case would fail to comply with the Constitution.

3. *The court order of February 5, 1970, including the Finger Plan.*—This order directs the desegregation of the schools. It offers the Finger plan as one way to do it, and encourages the Board to use its own resources to develop something better. As to the Finger elementary plan itself, the court, after eight days of further evidence and extensive further study, still finds it to be a reasonable method or collection of methods for solving the problem. The plan was designed by a qualified educator. It was drafted with technical assistance of the school staff. It does the complete job. It has a clear pupil assignment plan. It preserves a sound grade structure; it is adaptable to ungraded experimentation; it can be implemented piecemeal, in sections or by clusters of schools if necessary; it embraces local knowledge; it can be implemented immediately. It uses all reasonable methods of desegregation. It takes proper advantage of traffic movement and school capacity. It passes all tests of reasonableness.

4. *The 4/5 Minority Board Plan.*—This plan was presented intelligently and clearly by Dr. Carlton Watkins, its chief drafter, one of a 4/5 minority of the Board. It was spared any aggressive attack by Board witnesses or counsel. It is home grown. It was conceived and drafted by four members of the local Board. It uses all the techniques of the Finger plan. It desegregates all the schools. Like the Finger plan, it involves all communities of the county. It appears to the court that it can be implemented with somewhat shorter travel distances for school busses,

though perhaps a few more children might have to ride school busses than under the Finger plan. Its assignments are made with an eye toward the dynamics of community growth and shrinkage. It is spontaneous in origin and shows a willingness on the part of some of the Board to experiment. Its cost of implementation is roughly on a par with that of the Finger plan. Like the Finger plan, it can be implemented one part at a time and it does not create probabilities of resegregation of black schools. The principal fault of the minority plan is its present lack of a system of pupil assignment. Board witnesses were not willing to admit it outright, but the court has the very definite impression that they could draft a pupil assignment plan and put the minority plan into effect this fall if so directed by the Board.

5. *An earlier draft of the Finger plan.*—This draft, illustrated by Plaintiffs' Exhibit 10, is the first comprehensive recommendation of Dr. Finger to the court and to the school staff. It would require less transportation than any other plan before the court, and for shorter distances. It would have to be implemented all at once, and it does not involve all of the county in its scope. From the standpoint of economics it may be the cheapest plan available. From the standpoint of avoidance of tendencies toward resegregation and from the standpoint of total community involvement in the total community plan it is not on a par with the minority plan nor the final Finger plan. It is however, like the minority plan and the final Finger plan ordered by the court, a "reasonable" plan.

Memorandum of Decision and Order, dated August 3, 1970

VI.

A Reservation Concerning Reasonableness Versus Constitutional Rights

Reasonable remedies should always be sought. Practical rather than burdensome methods are properly required. On facts reported above, the methods required by this order are reasonable. However, if a constitutional right has been denied, this court believes that it is the constitutional right that should prevail against the cry of "unreasonableness." If a home has been illegally searched and evidence seized, the evidence is suppressed. If a defendant in a drunk driving case "takes the Fifth" and puts the state to its proof, the state has to prove its case without any testimony from him. The unreasonableness of putting the state to some expense can not be weighed against nor prevail over the privilege against self-incrimination or the right of people to be secure in their homes. If, as this court and the Circuit Court have held, the rights of children are being denied, the cost and inconvenience of restoring those rights is no reason under the Constitution for continuing to deny them. *Griffin* v. *Prince Edward County, supra.*

ORDER

1. Pursuant to the June 29, 1970 mandate of the Supreme Court of the United States, this court's order of February 5, 1970 will remain in effect pending these proceedings and except as modified herein or by later order of this court or a higher court.

2. The action of the Board in making faculty assignments in accordance with the order of February 5, 1970 is approved.

3. The action of the Board in making pupil assignments and other arrangements to operate the senior high schools in accordance with this court's order of February 5, 1970 is approved.

4. The action of the Board in making pupil assignments and other arrangements to operate the junior high schools in accordance with this court's order of February 5, 1970 is approved.

5. Numbered paragraphs 10 [823a] and 11 [824a] of the February 5, 1970 order of this court are amended by inserting the words "cumulative" and "substantially" at the appropriate points in each paragraph so that the two paragraphs will read as follows:

> "10. That 'freedom of choice' or 'freedom of transfer' may not be allowed by the Board if the cumulative effect of any given transfer or group of transfers is to increase substantially the degree of segregation in the school from which the transfer is requested or in the school to which the transfer is desired.
>
> "11. That the Board retain its statutory power and duty to make assignments of pupils for administrative reasons, with or without requests from parents. Administrative transfers shall not be made if the cumulative result of such transfers is to restore or substantially increase the degree of segregation in either the transferor or the transferee school."

6. As to the elementary schools:

(a) The order entered by this court on February 5, 1970 having been subjected to three weeks of review under the

reasonablness test is expressly found to be reasonable, and the School Board are directed to put the court ordered plan of desegregation into effect at the opening of school in the fall of 1970, *unless* they avail themselves of some of the options indicated herein.

(b) The plan for elementary school desegregation proposed by a 4/5 minority of the School Board (the Watkins plan) has been examined and is found to be reasonable, as far as it goes. It is, however, incomplete because it contains no plan for pupil assignment. The School Board are authorized to prepare an appropriate pupil assignment plan and use the minority plan for elementary school desegregation instead of the comparable portions of the plan previously ordered by the court, if they so elect.

(c) The School Board, if they so elect, may use portions of the minority plan and portions of the court ordered plan, bearing in mind that the most important single element in the order of this court on February 5, 1970 is paragraph 16, reading as follows:

> "16. The duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition. The *plans* discussed in this order, whether prepared by Board and staff or by outside consultants, such as computer expert, Mr. John W. Weil, or Dr. John A. Finger, Jr., are *illustrations of means or partial means to that end.* The defendants are encouraged to use their full 'know-how' and resources to attain the *results* above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or plan, but the *results.*"

(d) The Board are free to incorporate into any plan they may make whatever portions of the work of the Department of Health, Education and Welfare staff, or such parts of the original partial Finger plan (Plaintiffs' Exhibit 10), which are consistent with their duty to carry out the order to desegregate the schools.

(e) If the Board elect to carry out the Finger plan, they are authorized, if they find it advisable, to close Double Oaks school and reassign its pupils in accordance with the general purposes of the February 5, 1970 order.

(f) The Board are directed to file a written report with this court on or before noon on Friday, August 7, 1970, indicating what plan or combination of plans they have voted to use.

(g) The Board are again reminded, as they were reminded during the July 15, 1970 hearings, that since the 29th day of June, 1970, they have been and still are subject to the order of the Supreme Court, which reinstated this court's February 5, 1970 order pending these proceedings, and that this court will be under some duty to measure the Board's performance against what they could have done starting on June 29, 1970.

7. The following portion of this order is taken in modified form from the recommendations in the proposed plan of the Department of Health, Education and Welfare. It has been included in part in orders of district courts to various school systems, such as the school system in Dorchester County, South Carolina. It is included in this order not with any idea of impairing or affecting any party's right of appeal, but with the thought that this community

has a difficult job of implementing a major desegregation program and that just as in the case of Greenville, South Carolina, whose schools were desegregated before any final word came from the Supreme Court, it will take leadership to do the job. Some of these suggestions of the Department of Health, Education and Welfare are therefore incorporated in this order as follows, for such aid as they may be in working through the difficult administrative and community problems which must be overcome:

SUGGESTIONS FOR PLAN IMPLEMENTATION

Successful implementation of desegregation plans largely depends upon local leadership and good faith in complying with mandates of the Courts and the laws upon which the Courts act. The following suggestions are offered to assist local officials in planning for implementation of desegregational orders.

Community

1. The Superintendent and Board of Education should frankly and fully inform all citizens of the community about the legal requirements for school desegregation and their plans for complying with these legal requirements.

2. The Board of Education should issue a public statement clearly setting forth its intention to abide by the law and comply with orders of the Court in an effective and educationally responsible manner.

3. School officials should seek and encourage support and understanding of the press and community organizations representing both races.

4. The Board of Education, or some other appropriate governmental unit, should establish a bi-racial advisory committee to advise the Board of Education and its staff throughout the implementation of the desegregation plan. Such committee should seek to open up community understanding and communication, to assist the Board in interpreting legal and educational requirements to the public.

5. The Superintendent should actively seek greater involvement of parents of both races through school meetings, newsletters, an active and bi-racial P.T.A., class meetings, parent conferences, and through home visits by school personnel.

6. The Superintendent and Board of Education should regularly report to the community on progress in implementing the desegregation plan.

School Personnel

1. The Superintendent should provide all personnel copies of the desegregation plan and arrange for meetings where the personnel will have an opportunity to hear it explained.

2. The Board of Education should issue a policy statement setting forth in clear terms the procedures it will follow in reassignment of the personnel.

3. Assignments of staff for the school year should be made as quickly as possible with appropriate followings by school principals to assure both welcome and support for personnel new to each school. Invitations to visit school before the new school year begins should be offered.

4. The Superintendent should see that a special orientation program is planned and carried out for both the professional and non-professional staffs (including bus drivers, cafeteria workers, secretaries and custodians) preparatory to the new school year. He should make every effort to familiarize new and reassigned staff with facilities, services, and building policies, and prepare them to carry out their important role in a constructive manner. The Superintendent should direct each principal to see that each teacher new to a school is assigned for help and guidance to a teacher previously assigned to that school. Such teachers should have an opportunity to meet before the school year actually begins.

5. The Superintendent should arrange an in-service training program during the school year to assist personnel in resolving difficulties and improving instruction throughout the implementation period. Help in doing this is available from the St. Augustine College in Raleigh, North Carolina.

8. The Clerk is directed to serve copies of this order on the members of the School Board individually, and upon all other parties by sending copies by certified mail to their counsel of record.

9. Subject to further orders from higher courts, jurisdiction is retained, and the attention of the parties is called to pages 27 and 28 [1278a-1279a] of the order of the Fourth Circuit Court of Appeals respecting the duties of the court and the parties with regard to any desired modification of the plan or of this order.

Memorandum of Decision and Order, dated August 3, 1970

This the 3rd day of August, 1970.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

[The "18-page exhibit listing approximately 65 sections of the General Statutes of North Carolina and 2 sections of its Constitution under which segregation of the black race in North Carolina has been the policy of our Constitution and the letter of our statutes for many years (Br. A4)" is omitted.]

Memorandum Decision, dated August 7, 1970

The defendant school board and this court are under order of the Fourth Circuit Court of Appeals to produce a plan for desegregation of the elementary schools to "take effect with the opening of school next fall."

Pending the proceedings, by order of the Supreme Court of the United States, this court's February 5, 1970, judgment, including the Finger plan, is in effect.

On August 3, 1970, after lengthy hearings, this court by order directed the defendants to elect which among several options they had voted to use to desegregate the elementary schools.

On August 7, 1970, the board reported to the court that they have authorized an appeal from this court's order of August 3, 1970; that they reject the various options from among which the court authorized them to choose; and that the board

> "has no choice but to acquiesce in the District Court's order relative to its own elementary plan of February 5, 1970 . . . In acquiescing the Board is of the firm continuing opinion that the Court ordered plan of February 5, 1970, is unreasonable."

The court accepts the board's action as its undertaking to use the plan directed on February 5, 1970, (as modified on August 3, 1970) in its desegregation of the elementary schools.

This 7th day of August, 1970.

/s/ James B. McMillan
James B. McMillan
United States District Judge

Defendants' Report of Action Taken as Directed by the Court in Its Order of August 3, 1970

The Board of Education met in public session and adopted the following resolution for submission to the Court, said resolution being as follows:

"This written report is submitted to the United States District Court for the Western District of North Carolina pursuant to its mandate dated August 3, 1970, and entered into that certain civil proceedings entitled James E. Swann, et. al., plaintiff, vs. Charlotte-Mecklenburg Board of Education, et. al., defendants.

> " 'The Board are directed to file a written report with this Court on or before Noon Friday, August 7, 1970, indicating what plan or combination of plans they have voted to use.'

That Court, in its August 3, 1970, Order, provided that as to elementary schools, Paragraph 6-A.

> " 'The Order entered by this Court on February 5, 1970, having been subjected to three weeks of review under the reasonabless test, is expressly found to be reasonable and the School Board are directed to put the Court ordered plan of desegregation into effect at the opening of school in the fall of 1970 *unless* they avail themselves of some of the options indicated herein.'

"The School Board concluded that the options referred to, the Watkins, the early Finger and the HEW plans, do not offer reasonable alternatives which comply with the standards prescribed by the Court of Appeals of the Fourth Circuit and therefore has no choice but to acquiesce in the District Court's Order relative to its own elementary plan of February 5th which, upon rehearing, the District

Court itself found to be reasonable. In acquiescing the Board is of the firm continuing opinion that the Court ordered plan of February 5, 1970, is unreasonable."

Furthermore, the Board of Education authorized the Board Attorneys to appeal the Order of August 3, 1970, as it is deemed to be unreasonable and contrary to law.

/s/ William J. Waggoner
William J. Waggoner
Weinstein, Waggoner, Sturges, Odom & Bigger
1100 Barringer Office Tower
426 North Tryon Street
Charlotte, North Carolina 28202

/s/ Benjamin S. Horack
Benjamin S. Horack
Ervin, Horack and McCartha
806 East Trade Street
Charlotte, North Carolina

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, ET AL.,
Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,
Respondents.

AMICUS CURIAE BRIEF OF WILLIAM C. CRAMER

WILLIAM C. CRAMER, M.C.
2165 Rayburn Building
House of Representatives
Washington, D.C. 20515

Of Counsel:

RICHARD C. PEET
4442 Hawthorne Street, N. W.
Washington, D. C. 20016

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

TABLE OF CASES:

OTHER AUTHORITIES:

STATUTES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 281

JAMES E. SWANN, ET AL.,
Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, ET AL.,
Respondents.

AMICUS CURIAE BRIEF OF WILLIAM C. CRAMER

AUTHORITY TO FILE

All parties having consented, this Amicus Curiae brief is filed on behalf of William C. Cramer, Member of Congress from the 8th Congressional District of Florida, author of the amendment to section 401 (b) of the Civil Rights Act of 1964 prohibiting the assignment of students to public schools to overcome racial imbalance.

QUESTIONS ADDRESSED

1. Does section 5 of the Fourteenth Amendment empower the Congress to formulate legislative guidelines for enforcing the equal protection clause of that Amendment?

2. Is Title IV of the Civil Rights Act of 1964, relating to Desegregation of Public Education, a Constitutional expression of the authority conferred by section 5?

3. Was Title IV intended to be applied nationally or sectionally?

4. Does *de facto* segregation occur in the South?

5. Does the establishment of *de jure* quotas by the Courts constitute the assignment of students to public schools in order to overcome racial imbalance in violation of section 401 (b) of Title IV of the Civil Rights Act of 1964?

6. Are officials or courts of the United States 'empowered' to issue orders to bus pupils or students from one school to another or from one school district to another to racially balance student bodies although section 407 (a) of Title IV of the Civil Rights Act of 1964 specifically prohibits such orders?

I.

THE CONSTITUTIONAL SETTING

At the time the Constitution was being discussed by the Founding Fathers, the institution of slavery was prevalent throughout the former colonies—both North and South. How slaves were to be counted in the apportionment of power divided the Constitutional Convention. At one time, it broke up over the question. At no time, however, was the issue of Negro rights in any of its present ramifications within the contemplation of the drafters of the Charter.

When continued reservations of certain key leaders forced the adoption of the first Ten Amendments, they were added as a limitation on the power of the new Federal Government rather than as an inhibition on any of the powers then reserved to the States.

In the years following ratification, the issue of slavery became critical as the Nation expanded to the West. During this period, in the landmark Dred Scott decision, the rights of Negroes were further circumscribed.

Not until the post-Civil War period were the Dred Scott disabilities legislatively removed (in 1866). And not until the approval and ratification of the 13th, 14th,

and 15th Amendments were Constitutional protections relative to the treatment of Negroes finally adopted. At the time of their approval, however, many States—North, South, and Border—continued to maintain effective dual systems of laws for blacks and whites. Consequently, while Negroes were emancipated, their rights remained proscribed in law, customs, mores and tradition. In *Plessy* v. *Ferguson*,[1] the practice of providing 'separate but equal' accommodations was given formal judicial sanction. It remained the law of the land for the next half century.

In the Thirties and Forties, cases challenging the 'separate but equal' doctrine were pressed upon the courts. Not until the first *Brown* decision in 1954, however, was the doctrine, as it applied to education, finally overturned. Since then, the courts have played an increasingly activist role in effecting an end to segregation in public education.

But, the reach of the courts in such matters is Constitutionally circumscribed. All that was prohibited by the 14th Amendment was State action denying the equal protection of the laws because of race, color, or previous condition of servitude. Once such *de jure* denials were removed, the oversight authority of Federal courts logically ceased.

As to how such disabilities were to be removed, the amendment itself leaves no doubt. Section 5 categorically states that: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." This language makes it abundantly clear that the framers of the Fourteenth Amendment envisioned that the Congress of the United States, that is the elected representatives of the sovereign people, would have the final say in formulating guidelines for enforcing its provisions.

---

[1] 163 U.S. 537 (1896).

[1a] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

Granted this authority, it follows that once the "power to enforce" has been exercised in accordance with the language and tenor of the amendment, the courts are duty bound to give full expression to the legislative will for, to do otherwise, would contravene the law and violate Constitutional responsibilities. By the same token, if the Congress, in exercising its "power to enforce", exceeded duly conferred Constitutional authority, then the courts would be bound to strike down such measures.

Insofar as the question of school desegregation is concerned, the Congress has seen fit to act. On July 2, 1964, after lengthy deliberations, it approved and the President signed into law the Civil Rights Act of 1964, Public Law 88-352, 88th Cong., 2d Session, 78 Stat. 241. In the years since its passage, the Act has been the subject of both Executive action and Judicial interpretation. Unfortunately, in the process, the language and purpose of the National Legislature in approving it has frequently been misconstrued. Hence, the Congressional plan has been repeatedly contravened.

The aim of this brief is to present a selective legislative history of the Civil Rights Act of 1964. By doing so, it is hoped that those misconceptions which presently cloud, and at times compromise, the full and effective implementation of the Act's Constitutionally-conferred Congressional purposes can, once and for all, be laid to rest.

II.

LEGISLATIVE HISTORY OF TITLE IV

On June 19, 1963, President Kennedy submitted to the Congress a proposed Civil Rights Act of 1963. In a message accompanying the omnibus package, the President complained of "the slowness of progress toward primary and secondary school desegregation", noting that it was more than 9 years since the Supreme Court's decision in the *Brown* case. To speed the process of school desegregation, the President called on Congress to "assert its

specific Constitutional authority to implement the 14th Amendment." [2] Specifically, he recommended the enactment of a two-pronged approach for achieving desegregation in the public schools. The first was designed to accelerate the litigation process while, at the same time, relieving private individuals of the responsibility for initiating and prosecuting school desegregation cases. As expressed by the President: "Authority would be given the Attorney General to initiate in the Federal district courts appropriate legal proceedings against local public school boards or public institutions of higher learning—or to intervene in existing cases . . ." under the conditions set forth in the measure.[3]

The second prong of the President's plan proposed a program of Federal technical and financial assistance to aid school districts in the process of desegregation. As stated in the President's Message: [4]

> "As previously recommended, technical and financial assistance would be given to those school districts *in all parts of the country* which, voluntarily or after result of litigation, are engaged in the process of meeting the educational problems flowing from *desegregation or racial imbalance* but which are in need of guidance, experienced help, or financial assistance in order to train their personnel for this changeover, cope with any difficulty and complete the job satisfactorily (including in such assistance, loans to a district where State or local funds have been withdrawn or withheld because of desegregation)." [Emphasis added]

The Administration bill was introduced in the House of Representatives by Congressman Celler, Chairman of the Committee on the Judiciary. It was designated H.R.

---

[2] House Doc. 124, 88th Cong., 1st Sess. at 6 (1963).

[3] Id. at 6 and 7.

[4] Ibid.

7152, and referred to the Judiciary Committee and, in turn, to an appropriate subcommittee for consideration.

As introduced, Title III of the bill relating to "Desegregation of Public Education" consisted of ten sections. The first, (301), contained definitions. The next 5 sections (302 through 306) dealt with technical assistance to facilitate desegregation in the public schools. Sections 303 through 306, as originally introduced, in addition to desegregation, were also concerned with "other plans designed to deal with problems of racial balance in school systems." Indeed, throughout these sections, the term "racial balance" and "measures to adjust racial imbalance" were used repeatedly, as the following language will confirm:

> Sec. 302. The Commissioner shall conduct investigations and make a report to the President and the Congress, within two years of the enactment of this title, upon the extent to which equal educational opportunities are denied to individuals by reason of race, color, religion or national origin in public educational institutions at all levels *in the United States, its territories and possessions,* and the District of Columbia.
>
> Sec. 303. (a) The Commissioner is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit, to render technical assistance in the preparation, adoption, and implementation of plans for the desegregation of public schools *or other plans designed to deal with problems arising from racial imbalance in public school systems.* Such technical assistance may, among other activities, include making available to such agencies information regarding effective methods of coping with special educational problems occasioned by desegregation or racial imbalance, and making available to such agencies personnel of the Office of Education or other persons *specially equipped to advise and assist them in coping with such problems.*

(b) The Commissioner is authorized to arrange, through grants or contracts, with institutions of higher education for the operation of short-term or regular session institutes for special training designed to improve the ability of teachers, supervisors, counselors, and other elementary or secondary school personnel *to deal effectively with special educational problems occasioned by desegregation or measures to adjust racial imbalance in public school systems.* Individuals who attend such an institute may be paid stipends for the period of their attendance at such institute in amounts specified by the Commissioner in regulations, including allowances for dependents and including allowances for travel to attend such institute.

Sec. 304 (a). A school board which has failed to achieve desegregation in all public schools within its jurisdiction, *or a school board which is confronted with problems arising from racial imbalance* in the public schools within its jurisdiction, may apply to the Commissioner, either directly or through another governmental unit, for a grant or loan, as hereinafter provided, for the purpose of aiding such school board *in carrying out desegregation or in dealing with problems of racial imbalance.*

(b) The Commissioner may make a grant under this section, upon application therefor, for—

(1) the cost of giving to teachers and other school personnel inservice training *in dealing with problems incident to desegregation or racial imbalance in public schools;* and

(2) the cost of employing specialists in problems incident *to desegregation or racial imbalance and of providing other assistance to develop understanding of these problems by* parents, school children, and the general public.

(c) Each application made for a grant under this section shall provide such detailed information and be in such form as the Commissioner may require.

> Each grant under this section shall be made in such amounts and on such terms and conditions as the Commissioner shall prescribe, which may include a condition that the applicant expend certain of its own funds in specified amounts for the purpose for which the grant is made. *In determining whether to make a grant,* and in fixing the amount thereof and the terms and conditions on which it will be made, *the Commissioner shall take into consideration* the amount available for grants under this section and the other applications which are pending before him; the financial condition of the applicant and the other resources available to it; *the nature, extent, and gravity of its problems incident to desegregation or racial imbalance, and other such factors as he finds relevant.*
>
> * * * *
>
> Sec. 305. Payments pursuant to a grant or contract under this title may be made (after necessary adjustments on account of previously made overpayments or underpayments) in advance or by way of reimbursement, and in such installments, and on such conditions, as the Commissioner may determine.
>
> Sec. 306. The Commissioner shall prescribe rules and regulations to carry out the provisions of sections 301 through 305 of this title. [Emphasis added]

Although there were more complex titles in the bill, the proposed extension of technical assistance to problems related to 'racial imbalance' quite naturally focused congressional attention on Title III. Consequently, during the course of hearings on this provision, questions were repeatedly directed to witnesses in an effort to ascertain what the term 'racial imbalance' as used in the bill actually meant. Congressman Cramer, in particular, persistently sought a definition of this elusive phrase, but without success.[5]

---

[5] Hearings on H.R. 7152 before Subcom. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess. at 1782, 1888-1889, 2084-2086, 2138, 2163, 2234-2236 (1963).

Upon conclusion of the hearings, the Subcommittee met n Executive Session for 17 days to consider the omnibus ill. Ultimately, it struck out of H.R. 7152 all after the nacting clause and inserted an amendment in the nature f a substitute. The amended version was thereafter rec-mmended to the full Judiciary Committee. It contained a reworked version of old Title III, renumbered Title IV, embodying a number of major and minor changes. The most significant of these was the elimination from the Title of all authority to extend financial assistance to overcome problems of 'racial imbalance.' Various rea-sons were assigned for these deletions. As stated in the Report:[6]

> ". . . The Committee failed to extend this assistance to problems frequently referred to as 'racial imbal-ance' as no adequate definition of the concept was put forward. The Committee also felt that *this could lead to the forcible disruption of neighborhood pat-terns*, might entail inordinate financial and human cost and create more friction than it could possibly resolve." [Emphasis added]

The full Judiciary Committee, in its consideration of the bill, also adopted an amendment in the nature of a substitute. The Committee substitute was practically the same as the Subcommittee proposal relating to methods to effect desegregation in public education. As finally ap-proved, however, the renumbered Title was limited to au-thorizing suits by the Attorney General to further "the orderly achievement of desegregation in public educa-tion." As the analysis of the reported bill contained in the Committee's report confirms, all mention of or refer-ence to the controversial notion of 'racial balance' was stricken from the Title:[7]

---

[6] House Report 914, 88th Cong., 1st Sess. at 21-23 (1963).

[7] Id. at 23-24.

Section 401 contains definitions including the definition of "desegregation" as the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin.

Section 402 would direct the Commissioner of Education to conduct a survey and report to the President and Congress, within 2 years from enactment, concerning the lack of availability of equal educational opportunities by reason of race, color, religion, or national origin in public educational institutions at all levels.

Section 403 would authorize the Commissioner, upon the application of any State or local educational agency, to furnish technical assistance in the preparation, adoption, and implementation of plans for the desegregation of public schools.

Section 404 would authorize the Commissioner to arrange with colleges and universities for the operation of institutes for special training designed to improve the ability of teachers and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by school desegregation. Stipends could be paid to those attending such institutes in amounts specified by the Commissioner.

Section 405 (a) would authorize the Commissioner, upon application by a school board, to make a grant to defray the cost of (1) providing inservice training to teachers and other school personnel in dealing with problems incident to desegregation, and (2) employing specialists to advise in respect of such problems.

Section 405 (b) would direct that in passing on an application for a grant, the Commissioner take into consideration the total amount available for the grant program, other pending applications, the financial condition and resources of the applicant, and the seriousness of its problems incident to desegregation.

Section 406 would authorize payments pursuant to a grant or contract under title IV to be made by the Commissioner in advance or by way of reimbursement.

Section 407 (a) would confer authority upon the Attorney General to institute civil suits in the Federal district courts in order to achieve desegregation in public schools and colleges. He could bring suit when he received a written complaint from parents that the school board in their district had failed to achieve desegregation, or from an individual that he had been denied admission to or continued attendance at a public college by reason of race, color, religion, or national origin. As a prerequisite to suit, the Attorney General would be required to certify that the signers of the complaint were "unable to initiate and maintain appropriate legal proceedings" for relief, and that the institution of an action would materially further the public policy favoring the orderly achievement of desegregation in public education. It is not intended that determinations on which the certification was based should be reviewable.

Section 407 (b) provides that the Attorney General may deem a person "unable to initiate and maintain appropriate legal proceedings" within the meaning of subsection (a) if such person is unable to bear the expense of the litigation or obtain effective legal representation, or when the Attorney General is satisfied that the institution of the litigation by such person may result in injury or economic damage to him or his family.

Section 407 (c) provides that the term "parent" includes any person standing in loco parentis.

Section 408 provides that in any action or proceeding under title IV, the United States is to be liable for costs the same as a private person.

Section 409 provides that nothing in title IV shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education.

Despite these changes, Congressman Cramer's fears were still not allayed. They prompted him to pen these prophetic words in the Report:[8]

> "[A]s a matter of legal craftsmanship, this bill is inexpertly drafted, imprecisely worded and imperfectly oriented to the very problems it professes to solve. The ambiguity of its language creates a cloud of obscurity which conceals its potential consequences. While we are unprepared to say that the ambiguity is deliberate and calculated, it is difficult to believe that it is altogether accidental. Statutory ambiguities require judicial interpretation. In light of the trend court decisions have taken in recent years, it is not unrealistic to predict that the interpretations the courts would make would be of the broadest possible scope. *What the courts interpret tomorrow may be altogether different from what a majority of the Members of Congress intended . . .*" [Emphasis added]

Title IV was considered on the Floor of the House of Representatives on February 6, 1964. In all, eight amendments were proposed and two were adopted. Of particular moment was one offered by Congressman Cramer providing that the definition of "desegregation" in section 401 (b) "shall not mean the assignment of students to public schools in order to overcome racial imbalance." In explaining the need for and meaning of his amendment, the Florida lawmaker declared:[9]

> "Mr. Chairman, this amendment is very simple. *It does precisely and unequivocally what the proponents of the bill indicate they wanted to do. That is, to strike 'racial imbalance' from the bill* and from this title which I otherwise, in its present form, believe is still in the bill as I have said before many times.

---

[8] House Report 914, 88th Cong., 1st Sess. at 112 (1963).

[9] 110 Cong. Rec. 2280 (1964).

"In the hearings before the committee I raised questions on 'racial imbalance' and in the subcommittee we had lengthy discussions in reference to having these words stricken in the title, as it then consisted, and to strike out the words 'racial imbalance' proposed by the administration.

"*The purpose is to prevent any semblance of congressional acceptance or approval . . . to include in the definition of 'desegregation' any balancing of school attendance by moving students across school district lines to level off percentages where one race outweighs another.*" [Emphasis added]

At the conclusion of his remarks, Congressman Celler, Chairman of the Judiciary Committee and a Floor Manager of the bill, sought recognition: [10]

"Mr. CELLER. Mr. Chairman, will the gentleman yield?

"Mr. CRAMER. I yield to the gentlemen from New York.

"Mr. CELLER. Mr. Chairman, the amendment offered by the gentleman from Florida is acceptable.

"The CHAIRMAN. The question is on the amendment offered by the gentleman from Florida (MR. CRAMER)."

The Cramer amendment was thereafter unanimously adopted by the House.

On February 10, 1964, the House passed and sent to the Senate the proposed Civil Rights Act of 1964, including amended Title IV. In that Body, supporters of the omnibus legislation moved for immediate consideration of the House bill in order to avoid referring it to the Judiciary Committee, traditionally hostile to such measures. Their efforts were successful. In the early stages of the Floor debate that followed, proponents expressed the hope that the House bill would be accepted without modification, thus obviating the necessity of extended consid-

[10] Ibid.

eration of the bill and a House-Senate Conference. This effort did not succeed, however. In consequence, the Senate deliberated on H.R. 7152 for 83 precedent-smashing days.

As in the House, one of the principal concerns of Senate Members was the meaning and application of 'racial balance' insofar as the amended version of the bill was concerned. Because of grave reservations on this score, additional clarifying amendments were demanded as the price for approval of the bill. Their literal effect was to deny any "official" or "*court*" of the United States the power "to issue any order seeking to achieve a racial balance in any school requiring the transportation of pupils or students from one school to another or one district to another in order to achieve such racial balance, or otherwise enlarge the *existing power* of the court to insure compliance with constitutional standards." [11] Since "existing power" as asserted by the courts at the time, comprehended only ending segregation in the schools, not promoting integration, Congress sought to make it crystal clear that no enlargement of that authority was contemplated by the Act. In other words, it, rather than the courts, would set the guidelines for desegregating public schools. No better elucidation of this can be found than in the amplifying remarks of then-Majority Whip Hubert Humphrey speaking for the Managers of the bill: [12]

> "Next, changes are made to resolve doubts that have been expressed about the impact of the bill on the problem of correcting alleged *racial imbalance* in public schools. *The version enacted by the House was not intended to permit the Attorney General to bring suits to correct such a situation,* and indeed, said as much in section 401 (b). However, *to make this doubly clear, two amendments* dealing with this matter are *proposed.*

[11] 110 Cong. Rec. 12714 (1964).

[12] Id. at 12717.

"The first provides that nothing in title IV 'shall empower any 'court' or 'official' of the United States to issue 'any order' seeking to achieve 'a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance or otherwise enlarge the existing power of the court to insure compliance with constitutional standards.' *This addition seeks simply to preclude an inference that the title confers new authority to deal with 'racial imbalance' in schools, and should serve to soothe fears that title IV might be read to empower the Federal Government to order the busing of children around a city in order to achieve a certain racial balance or mix in schools.*

"*Furthermore, a new section 410 would explicitly declare that 'nothing in this title shall prohibit classification and assignment for reasons other than race, color, religion, or national origin.'*

"*Thus, classification along bona fide neighborhood school lines, or for any other legitimate reason which local school boards might see fit to adopt, would not be affected by title IV, so long as such classification was bona fide. Furthermore, this amendment makes clear that the only Federal intervention in local schools will be for the purpose of preventing denial of equal protection of the laws.*" [Emphasis added]

Senator Javits of New York, a staunch proponent of civil rights, likewise sought to reinforce these understandings: [13]

"Taking the case of the schools to which the Senator is referring, and the danger of envisaging the rule or regulation relating to racial imbalance, it is negated expressly in the bill. . . . Therefore *there is no case in which the thrust of the statute* under which the money would be given *would be directed toward . . . bringing about a racial balance in the schools.*

[13] Id. at 12714.

> If such a rule were adopted or promulgated by a bureaucrat, and approved by the President, the Senator's State would have *an open and shut case* under Section 603. *That is why we have provided for judicial review.* The Senator knows as a lawyer that we never can stop anyone from suing, *nor stop any Government official from making a fool of himself,* or from trying to do something that he has no right to do . . ." [Emphasis added]

From the foregoing, it is evident that the Senate was fully cognizant of the ambitions of some 'courts' and 'officials' to enlarge the legislative plan from one aimed at ending segregation to one seeking to end so-called racial isolation by compelling racial balance in the Nation's public schools. Both through amendments and colloquy it attempted to nip these ambitions in the bud, as witness the following exchange between Senator Robert Byrd of West Virginia and Administration-spokesman Senator Humphrey: [14]

> "Mr. Byrd of West Virginia. Can the Senator from Minnesota assure the Senator from West Virginia that under title IV school children may not be bused from one end of the community to another end of the community at the taxpayers' expense to relieve so-called racial imbalance in the schools?
>
> "Mr. Humphrey. *I do.*
>
> • • • •
>
> [Mr. Humphrey.] "[*T*]*he Constitution prohibits segregation, it does not require integration. The busing of children to achieve racial balance would be an act to effect the integration of schools. In fact, if the bill were to compel it, it would be a violation, because it would be handling the matter on the basis of race and we would be transporting children because of race.* The bill *does not attempt to integrate* the schools, but it does attempt to eliminate segregation in the school systems. *The natural factors such*

[14] Id. at 12715, 12717.

as density of population, and the distance that students would have to travel are considered legitimate means to determine the validity of a school district, if the school districts are not gerrymandered, and in effect deliberately segregated. The fact that there is a racial imbalance per se is not something which is unconstitutional." [Emphasis added]

As already mentioned, debate in the Senate went on for 83 record-breaking days. Along the way, it became obvious to all concerned that the necessary ⅔'s vote for cloture, i.e. to shut off debate, could not be obtained unless sufficient clarifications and assurances were provided by the managers of the bill and appropriate amendments had been offered and accepted. Consequently, the Senate leadership, in consultation with the Attorney General, drafted a substitute containing them. The compromise measure won over a sufficient number of Senators to secure the necessary strength to effect cloture and the filibuster was ended. Nine days later, the Senate passed and sent to Conference a reworked version of H.R. 7152 containing the anti-busing guarantees of sections 401 (b) (the Cramer Amendment) and 407 (a).

On July 2, 1964, the House concurred with Senate amendments and the Civil Rights Act of 1964 was signed into law by then-President Lyndon Johnson.

III.

JEFFERSON AND BEYOND— THE SECOND RECONSTRUCTION

A. The Promise of Uniformity

Shortly after the Civil Rights Act of 1964 became the law of the land, a three-judge panel of the Fifth Circuit Court of Appeals undertook to review a consolidated group of school desegregation cases.[18] Their "distinctive features" declared the tribunal, are that they "require us

[18] *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (C.A. 5, 1966), commonly referred to as *Jefferson I*.

to re-examine school desegregation in the light of the Civil Rights Act of 1964 and the Guidelines of the United States Office of Education, Department of Health, Education, and Welfare (HEW)." [16]

The panel evidenced its sensitivity and awareness of its role in the constitutional scheme of things when it declared in its opinion:

> "More clearly and effectively than either of the other two coordinated branches of government Congress speaks as the voice of the nation." [17]

And again, when it said:

> "When Congress declares national policy, the duty the other two coordinated branches owe to the nation requires that, within the law, the judicial and executive respect and carry out that policy." [18]

And again:

> "We shall not permit the Courts to be used to destroy or dilute the effectiveness of the Congressional policy . . ." [19]

This apparent desire and determination to conform to its constitutional role as interpreter of the Nation's laws in order to effectuate national goals was commendable. Unfortunately, performance failed to measure up to promise. As the following analysis will show, the Court, in rendering its decision, repeatedly misconstrued and misinterpreted the Congressional will. Standing alone, each of its errors of construction represented a serious departure from what Congress intended. In synergistic combination, their effect has been to provide the judicial underpinnings for a radical revamping, recasting and re-

---

[16] Id. at 845.

[17] Id. at 850.

[18] Id. at 856.

[19] Id. at 859.

ordering of Congressional priorities, policies, and purposes.

In the process, the Congressional will has been blurred and blunted and the promise and potential of the Civil Rights Act of 1964 has gone unrealized and unfulfilled.

B. The De Facto-De Jure Distinction

The goal of proponents of those provisions of the Civil Rights Act of 1964 dealing with education (Titles IV and VI) was to provide a uniform Federal approach for ending discrimination in the Nation's public schools. This aim was underscored by President Kennedy in his Message to Congress proposing enactment of the measure:

> "This is not a sectional problem—it is nationwide. . . . A national domestic crisis also calls for bipartisan unity and solutions." [20]

It was echoed in the Report of the House Judiciary Committee:

> ". . . H.R. 7152, as amended, resting upon [constitutional] authority is designed as a step toward (sic) eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope." [21]

And re-echoed on the Floor in both Houses of Congress:

> "'E Pluribus Unum'. We want unity. Equity begats unity. We want one and the same treatment for all." [22]

The Court in *Jefferson I* exhibited its perception of the pitfalls of a piecemeal approach in this memorable passage from its opinion:

> "In sum, the lack of uniform standards has retarded the development of local responsibility for the ad-

---

[20] House Doc. 124, 88th Cong., 1st Sess. 13 (1963).

[21] House Report 914, 88th Cong., 1st Sess. at 18.

[22] Senator Pastore, a principal spokesman for the bill, 110 Cong. Rec. 7059 (1964).

ministration of schools without regard to race or color. What Cicero said of an earlier Athens and an earlier Rome is equally applicable today." [23]

But the type of uniformity it had in mind was of a peculiar variety. By judicial fiat, it was to apply to Rome and Athens, Georgia (and other communities in the South), not to the Nation as a whole. Adopting the "ingenious though illogical distinction" [24] between so-called *de facto* and *de jure* segregation, it concluded that Congress had intended that the 'equal protection clause' was to be applied unequally and that, in effect, every manifestation of racial isolation in the South constituted *de jure* segregation. Whether Congress could have passed sectionally directed legislation had it wanted to is open to serious doubt. That it never contemplated such a double standard, is not, however. For the Court to have imputed such an intention was to thwart congressional will and, in the process, raise the spectre of a Second Reconstruction in America—one effected by judicial ukase.

The Court's rationale for this divisive rendering of the Union of States was this: Since the South was the area of the Nation which had maintained dual systems of education imposed by law prior to *Brown I*, the South required special rules for rehabilitation and reform—by implication, in perpetuity.

From a purely judicial standpoint, there would, at first blush, appear to be some justification for this view. The reason: It is generally presumed that the *Brown* decisions focused on the special problems of dual school systems in the old Confederacy. As a matter of fact, however, half of the consolidated group of cases decided in *Brown* actually originated elsewhere, i.e. in Kansas and Delaware. Thus, the notion that these decisions were con-

---

[23] *Jefferson I* at 861.

[24] *United States* v. *Jefferson County School Board*, 380 F.2d 385 (C.A. 5, 1967), commonly referred to as *Jefferson II* at 398, Judge Gewin dissenting.

fined to the South is without foundation. So too is the unsupported proposition that the Congress intended the Civil Rights Act of 1964 to either establish or perpetuate arbitrary sectional differences. Indeed, everything the National Legislature said and did confirmed a contrary intention. In the words of Senator Pastore: "There must be only one rule to apply to every State." [25]

Yet the Court made short work of such evidences. The "similarity of pseudo *de facto* segregation in the South to actual *de facto* segregation in the North", it declared, "is more apparent than real." [26] Only "segregation resulting from racially motivated gerrymandering is properly characterized as '*de jure*' segregation", [27] it asserted. And, such gerrymandering, in the Court's lights, occurred only in the South.

The Court therefore concluded that:

> "Adequate redress . . . calls for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the State's system of *de jure* school segregation and the organized undoing of the effects of past segregation." [28]

Perhaps the most curious of the curious reasoning resorted to by the Court to justify the legislative lobotomy it was performing related to the role attributed to the author of section 401 (b). In commenting on his reasons for offering this provision, it blandly asserted that:

> ". . . Congressman William Cramer, who offered the amendment, was concerned that the bill as originally proposed might authorize the government to require busing to overcome *de facto* segregation." [29]

---

[25] Senator Pastore, 110 Cong. Rec. 7059 (1964).

[26] *Jefferson I* at 876.

[27] Id. at 876.

[28] Id. at 866.

[29] Id. at 879.

Having reached this conclusion, it interpreted his proposal in this way:

> "The affirmative portion of this definition, down to the 'but' clause, describes the assignment provision necessary in a plan for conversion of a *de jure* dual system to a unitary, integrated system. The negative portion, starting with 'but', excludes assignment to overcome racial imbalance, that is acts to overcome *de facto* segregation." [30]

It then determined that:

> "As used in the Act, therefore, 'desegregation' refers only to the disestablishment of segregation in *de jure* segregated schools." [31]

In effect, therefore, the Court decided that the Cramer Amendment did not mean what it said. Although the language declared that " 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance", it found that the author intended only a limited prohibition. What Congressman Cramer and his colleagues wanted, according to the Court, was to prevent racial balance in *de facto* areas (all presumably in the North), not in his own constituency in the South where all separation of the races was presumed to be *de jure* in nature.

That the Court attributed such an intention to the Florida lawmaker seems hardly credible. In point of fact, what he actually sought to accomplish through his amendment was something quite different. From the debates, it is evident that the common understanding of Members of Congress at the time of its consideration was that *de facto* segregation was separation of the races by personal choice or preference and that such separation occurred in all sections of the Country—South as well as North. *De jure* segregation, on the other hand, was separation imposed by law or color of law. While primarily confined

---

[30] Id. at 878 referring to Section 401 (b) of the Act.

[31] Ibid.

o the South, it was recognized that insidious manifestations existed in all parts of the Nation. The Civil Rights Act of 1964 embodied these understandings. Its aim was o root out all forms of *de jure* segregation nationwide. *De facto* segregation, however, that is the right of free association as reflected in neighborhood living patterns, was to be left alone wherever it occurred—North or South.

The contrary holding of the three-judge panel in *Jefferson I* that the Civil Rights Act of 1964 contemplated a double standard of administration, flies in the face of these understandings. Unfortunately, it was approved by the Court of Appeals, sitting in banc, in *Jefferson II* and thereafter, in one form or other, in a steady line of cases emanating from the Fifth and other Circuits ever since. Some have even gone so far as to assert, in effect, that Black neighborhoods in the South are *de jure* segregated per se. Through such arbitrary determinations, the literal and logical distinction between *de facto* (by choice) and *de jure* (by law) segregation which Congress believed it had written into the Civil Rights Act of 1964, has been all but obliterated.

C. Desegregation and Racial Balance

The Fourteenth Amendment provides that no State shall deny to any of its citizens the equal protection of the laws. The negative character of that enjoinder has been uniformly adhered to through the years.

In 1883, for example, the Supreme Court of the United States in the *Civil Rights Cases* [22] unequivocally held that the Fourteenth Amendment is a prohibition against State action and only State action. Mr. Justice Bradley delivered the opinion of the Court in which the principle was stated:

> "It is State action of a particular character that is prohibited. . . . [The amendment] nullifies and makes

[22] 109 U.S. 3, 11 (1883).

> void all State legislation, and State action of every kind, which denies to any the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. . . ."

More recently, the Supreme Court reaffirmed those principles in *Burton* v. *Wilmington Parking Authority*[33] when it announced that the *Civil Rights Cases*, "embedded in our constitutional law" the principle "that the action inhibited by the . . . Fourteenth Amendment is only such action as may fairly be said to be that of the States."

In *Briggs* v. *Elliott*, this view was upheld when the Court, seeking to "point out exactly what the Supreme Court had decided and what it has not decided" in *Brown* declared:

> "It has not decided that the federal courts are to take over and regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . The Constitution, in other words, does not require integregation. It merely forbids discrimination."[34]

The same view was espoused in *Queen Cohen* v. *Public Housing Administration*, when Judge Rives, speaking for the Court, stated:

---

[33] 365 U.S. 715, 721 (1961).

[34] *Briggs* v. *Elliott*, 132 F. Supp. 776, 777 (E.D.S.C., 1955).

[e]ither the Fifth nor the Fourteenth Amendments
[o]erate positively to command integration of the
"[r]ces, but only negatively to forbid governmentally
op[p]forced segregation." [35]

[P]enident Kennedy, in submitting his Civil Rights Mes-
Pres[s] 1963, however, urged that the Congress scrap this
[a]ge in[s]ch in favor of a radical new one. What he pro-
[a]pproain effect, was that the time-honored, judicially ap-
[p]osed, distinction between desegregation and integration
[h]rovedinguished by legislative fiat and a new standard
[t]e exting racial balance substituted. In the President's
[r]equiri
[w]ords:

"[A]s previously recommended, technical and financial
[a]sistance would be given to those school districts
[a]s *all parts of the country* which, voluntarily or as
[t]he result of litigation, are engaged in the process
[o]f meeting the educational problems flowing from
desegregation or racial imbalance . . ." [36] [Emphasis
[a]dded]

[T]The language of the bill accompanying the Presidential
Messa[g]e embodied this approach. As proposed, it con-
tained a series of provisions whose enactment would have
had t[h]e effect of legislatively approving the requirement
of 'ra[c]ial balance' as an equivalent of or supplement to
desegr[e]gation. Members of Congress were, of course,
aware of the implications of President Kennedy's proposal
and t[h]ey did what they thought was necessary to elimi-
nate [s]uch provisions from the bill.

At first blush, some of the statements of the Court in *Jefferson I*, convey the impression that the National Legislature succeeded. On page 849, for example, the opinion states:

"Congress decided that the time had come for a sweeping Civil Rights advance, including *national*

---

[35] 257 F.2d 78, 78 (C.A. 5, 1958).

[36] Message to Congress, H.Doc. 124, 88th Cong., 1st Sess. at 7 (1963).

> legislation to speed up *desegregation* of public schools and to put teeth into enforcement of *desegregation*. Titles IV and VI together constitute *the congressional alternative to court-supervised desegregation*." [Emphasis added]

And again, on page 851 of the opinion:

> "In April 1965, Congress for the first time in its history adopted a law providing general federal aid—a billion dollars a year—for elementary and secondary schools. It is a fair assumption that Congress would not have taken this step had Title VI not established the principle that schools receiving Federal assistance must meet *uniform national standards* for *desegregation*." [Emphasis added]

But such statements were mere windowdressing. Far from adhering to the desegregation objectives Congress set forth, the Court, in easy stages, proceeded first to undermine and then recast them. "There is not one Supreme Court decision", it declared, "which can be fairly construed to show that the Court distinguished 'desegregation' from 'integration' in terms or by even the most gossamer implication . . ." [37] Manifestly, therefore, "the duty to desegregate schools extends beyond mere 'admission' of Negro students on a non-racial basis." [38] Having established this it was but a short step to a declaration that:

> "The Constitution is both color blind and color conscious." [39]
>
> "Here race is relevant, because the governmental purpose is to offer Negroes equal educational opportunities. The means to that end, such as disestablishing segregation among students, distributing the bet-

---

[37] *Jefferson I*, 846 n.5. It did not, of course, because at the time the decision was rendered it obviously felt that universally accepted semantic differences did not require it to.

[38] Ibid.

[39] Id. at 876.

ter teachers equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation, must necessarily be based on race." [40]

And from this to citing with approval the proposition that:

"The courts and HEW cannot measure good faith or progress without taking race into account. '*When racial imbalance infects a public school system*, there is simply no way to alleviate it without consideration of race.'" [41] [Emphasis added]

In this fashion, "the unquestioned intent of Congress as illustrated by the legislative history" was obliterated, as was the former generally understood distinction between desegregation and integration.[42]

But the Court was still not content. "Some of the difficulty in understanding the Act and its legislative history", it stated, "arises from the statutory use of the undefined term 'racial imbalance'. It is clear, however, from the hearings and debates that Congress equated the term, as do the commentators, with '*de facto* segregation', that is, non-racially motivated segregation in a school system based on a single neighborhood school or all children in a definable area." [43]

Having reached this conclusion, it then went on to sanction racial balancing in non *de facto* areas i.e. all of the South, in this way:

"The provision referring to percentages (in HEW Guidelines) is a general rule of thumb or objective administrative guide for measuring progress in de-

---

[40] Id. at 877.

[41] Ibid. Citing Wright, Public School Desegregation: Legal Remedies for *De Facto* Segregation, 16 West. Res. L.Rev. 478, 489 (1965).

[42] *Jefferson II* at 407, Cox dissenting.

[43] *Jefferson I* at 878.

> segregation rather than a firm requirement that must be met." [44]

It further observed that:

> "Common sense suggests that a gross discrepancy between the ratio of Negroes to white children in a school and the HEW percentage guides raises an inference that the school plan is not working as it should in providing a unitary, integrated system." [45]

Thus was the transition made from *de facto* to *de jure*, from desegregation to integration and, finally, from ending racial classifications to *de jure* quotas and balancing.

In the years since its rendering, the misinterpretations of legislative meaning and intent reflected in *Jefferson* have been enlarged and expanded upon. In the process, what amounts to a wholesale diversion of the will of the National Legislature as expressed in the Civil Rights Act of 1964 has taken place. Thus:

Where Congress desired that the provisions of the Act be uniformly applied in all fifty States, not on a sectional basis, the Courts have limited effective coverage to the old Confederacy.

Where Congress struck the notion of racial balance as an equivalent of or supplement to desegregation from the original bill, the Courts have treated the matter as if it had never been considered.

Where Congress, seeking to accord its negative action positive standing, specifically amended the Act to provide that desegregation shall not mean the assignment of students to overcome racial imbalance, the Courts have circumvented its intention by ruling that the prohibition applied only in *de facto* areas of the North, not at all in the South where all segregation was held to be *de jure* per se.

---

[44] Id. at 886-887.

[45] Id. at 888.

Where Congress defined desegregation to mean the assignment of pupils "without regard to their race", the courts have decided that the opposite was intended; that classification by race was necessary to remove the effects of past racial classification.

Where Congress sought to forestall attempts by courts or officials to bus students to achieve racial balance, the courts have approved what amounts to *de jure* quotas to measure compliance with their orders.

Where Congress sought to preserve neighborhood schools, the courts have set the stage for dismantling them.

IV.

CONCLUSION

The fundamental purpose of the Supreme Court in *Brown I* was to end legalized discrimination in public schools in order to improve the quality of education for Negro children. For a decade, decisions of the Court echoed and re-echoed this objective.

In enacting the Civil Rights Act of 1964, the Congress sought to further this end. Its aim was to provide the legislative wherewithal to marshal the full resources of the Federal Government to enhance the educational opportunities and, in the process, the quality of life, for Black Americans.

Unfortunately, almost before the ink was dry on this landmark measure, the Courts and the Executive began to circumvent Congress' handiwork. From a measure specifically designed to end segregation in the interest of education, it was reframed and reformulated until today it is cited as a statutory prop for balancing for balance's sake, for destroying neighborhood integration in order to accomplish racial integration, and, in an Orwellian exercise in 'doublethink', for perpetuating classification by

race in order to remove the inequities created by racial classification. Small wonder, under the circumstances, that increasing numbers of Americans of both races are disillusioned, that Congress is concerned, that the Executive is confused, and that the Judiciary, as evidenced by the diversity of its opinions, is bewildered.

Ironically, the present disillusionment and disenchantment would probably never have developed had the Courts and the Executive kept their respective eyes on the educational ball and on the carefully-considered measures that the people's representatives in the National Legislature framed to assist them. When, pursuant to its constitutionally-delegated authority that it "shall have power to enforce by appropriate legislation the provisions of" the Fourteenth Amendment, Congress passed the Civil Rights Act of 1964, its stated and restated objective was to provide the means for ending *segregation* in public education. This was the aim, the ideal, the raison d'etre.

To insure that this oft-stated goal would be strictly followed, the Congress provided what it considered to be satisfactory safeguards and assurances. These included the following:

(1) the Act would be uniformly applied in all 50 States;

(2) desegregation would not comprehend the notion of racial balance as either an equivalent or supplement;

(3) no assignment of students would be made to overcome racial imbalance;

(4) neighborhood schools would be maintained.

This desegregation theme runs through Congress' deliberations in Committee, its reports, and its debate on the Floors of both Houses. Its fundamental, its sole, its exclusive aim was to make the statute conform to Judge Parker's decision in *Briggs* that the Constitution is color

lind, not color conscious."[46] Managers of the bill emhasized and re-emphasized their understandings in this egard for, had they not, the necessary votes for passage f this extremely controversial measure would never have een forthcoming.

Unfortunately for the cause of civil rights and of education, the Courts and the Executive have misconstrued the Congressional will. As a result, a widening gulf between the promise of the Act and the performance of the Executive and the Courts in implementing and interpreting it has developed.

Justice Brandeis, one of the greatest civil libertarians ever to grace the bench, once said: "Experience teaches us to be most on our guard to protect liberty when the Government's purposes are beneficent."

It would be the ultimate irony if 'beneficent' attitudes on the part of well-meaning Executive and Judicial civil rights proponents had the ultimate effect of indelibly branding into the public consciousness the false notions that Blacks had to be treated unequally in order to be equal; that they are unable to either teach or learn from one another; that they, like some American Indians, in their own interest, must be made permanent wards of an all beneficent State.

Yet, is not this precisely what is happening?

What is to be done? Obviously, the Courts are at a judicial crossroads. If their efforts to improve educational opportunities for Black Americans are not to bear rancid fruit, they simply cannot continue to ignore the political, social, constitutional, and legislative mandate of the Civil Rights Act of 1964.

Some may argue that it is already too late; that past mistakes of interpretation cannot now be undone. But

[46] *Briggs* v. *Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955).

such assertions are falacious. After all, the Supreme Court waited half a century to undo *Plessy*. A mere half decade has passed since the 'balancing' trend began.

A vast reservoir of racial good will still exists. The opportunity to move ahead thus remains. If reason rules, progress will be great. But, if it does not, then a harsh night of disharmony, disruption, and discord will descend upon our land as a new era of Reconstruction—this time judicially imposed—rends the Nation assunder once again.

If this comes to pass, who can seriously argue that the cause of education for Black Americans, or for that matter, for any American, will be advanced?

Respectfully submitted,

WILLIAM C. CRAMER, M.C.
2165 Rayburn Building
House of Representatives
Washington, D.C. 20515

Of Counsel:

RICHARD C. PEET
4442 Hawthorne Street, N.W.
Washington, D.C. 20016

INDEX

TABLE OF AUTHORITIES CITED

CASES:

STATUTE CITED

ISCELLANEOUS:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 281

JAMES E. SWANN, *et al.*,

Petitioners,

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE NATIONAL EDUCATION ASSOCIATION

e National Education Association (hereinafter NEA) is dependent, voluntary organization of professional edu-s. It has over one million members, including teachers, visors, and administrators. As stated in the Associa- Charter, its purpose is "to elevate the character and ce the interests of the profession of teachers and to ote the cause of education in the United States." Both EA and its members have a deep interest in the qual- education received by children of all races. NEA con- it imperative that pursuant to *Brown v. Board of Ed-*

ucation, 347 U.S. 483 (1954), desegregation of the nation's schools be complete and effective. NEA has recently conducted investigations of the problems of race and education in the school systems of Wilcox County, Alabama; Baltimore, Maryland; some 22 counties in Louisiana; Detroit, Michigan; some 30 counties in Mississippi; Hyde County, North Carolina; and the region of East Texas. NEA has also participated as a party or as *amicus curiae* in several school desegregation cases, including the proceedings in the instant case before the Fourth Circuit and before this Court on the petition for certiorari, and in numerous others has actively supported efforts to secure judicial relief.

STATEMENT

This case is before the Court on certiorari to review the judgment of the court of appeals insofar as it vacated the order of the district court requiring implementation of that court's desegregation plan for the Charlotte-Mecklenburg School District. The court of appeals affirmed the district court's order to the extent that it required implementation of the desegregation plan for senior and junior high schools. That part of the court of appeals judgment is not challenged in this case. It is attacked in a cross-petition for certiorari (No. 349) that was filed by respondents herein on July 2, 1970. To date, the cross-petition has not been granted.

Accordingly, we deal in this brief with the part of the court of appeals judgment challenged by petitioners, *i.e.*, that part vacating the district court's order insofar as it provided for the assignment of elementary school pupils and remanding that aspect of the case to the district court for further proceedings. The district court has now held hearings upon the remand and on August 3, 1970, issued a new order directing the School Board to put the court's elementary school desegregation order here involved into effect at the opening of the 1970 fall term unless the Board chooses to prepare a pupil assignment plan for use with the deseg-

regation plan recently proposed by a minority of the Board or to implement portions of both the court's plan and the minority plan so as to achieve the requisite desegregation of the schools. (Memorandum of Decision and Order, August 3, 1970, pp. 32-33).[3]

[3]In pertinent part, the court's August 3 order provided:

As to the elementary schools:

(a) The order entered by this court on February 5, 1970 having been subjected to three weeks of review under the reasonableness test is expressly found to be reasonable, and the School Board are directed to put the court ordered plan of desegregation into effect at the opening of school in the fall of 1970, *unless* they avail themselves of some of the options indicated herein.

(b) The plan for elementary school desegregation proposed by a 4/5 minority of the School Board (the Watkins plan) has been examined and is found to be reasonable, as far as it goes. It is, however, incomplete because it contains no plan for pupil assignment. The School Board are authorized to prepare an appropriate pupil assignment plan and use the minority plan for elementary school desegregation instead of the comparable portions of the plan previously ordered by the court, if they so elect.

(c) The School Board, if they so elect, may use portions of the minority plan and portions of the court ordered plan, bearing in mind that the most important single element in the order of this court on February 5, 1970 is paragraph 16, reading as follows:

> 16. The duty imposed by the law and by this order is the desegregation of schools and the maintenance of that condition. The *plans* discussed in this order, whether prepared by Board and staff or by outside consultants, such as computer expert, Mr. John W. Weil, or Dr. John A. Finger, Jr., are *illustrations of means or partial means to that end.* The defendants are encouraged to use their full 'know-how' and resources to attain the *results* above described, and thus to achieve the constitutional end by any means at their disposal. The test is not the method or plan, but the *results.*

(d) The Board are free to incorporate into any plan they may make whatever portions of the work of the Department of Health, Education and Welfare staff, or such parts of the original partial Finger plan (Plaintiffs' Exhibit 10), which are consistent with their duty to carry out the order to desegregate the schools.

We understand that the entire Memorandum of Decision and Order will be printed as an Appendix to the Brief for Petitioners.

The court of appeals opinion lays down several general principles (189a):[4] First, contrary to the view of the district court, a unitary school system does not require that each and every school within the system be integrated. Second, even so, the school board "must use all reasonable means to integrate" the schools within its jurisdiction. Third, if black residential areas are so large that not all schools can be integrated by using "reasonable means," the school board "must take further steps to assure that pupils are not excluded from integrated schools on the basis of race." Specifically, the school board should make available to children in identifiably black schools (that cannot be integrated by "reasonable means") integrated special classes, functions and programs, the right to transfer, with free transportation, from a school with a majority of black students to a school with a black minority, and assignment to integrated schools as these children come up the educational ladder.

The court of appeals explained its "reasonable means" test as requiring a school board to make "every reasonable effort" to integrate each school (189a-190a). Efforts that are not "reasonable" would apparently not be required so long as the school board takes the "further steps" noted above.

"Every reasonable effort" to desegregate is all that is required under the court of appeals opinion even though the black residential areas in Charlotte that are "so large" as to defy desegregation through the use of "reasonable means" are attributable to federal, state and local governmental action (189a). The court of appeals accepted as supported by the evidence the district court's findings that the existing residential separation of the races in Charlotte had been produced in part by governmental action and that the superimposition of neighborhood school lines upon governmen-

---

[4]Citations are to pages in the "Appendix to Petition for Certiorari, Opinions Below."

tally fostered segregated neighborhoods resulted in the creation by the School Board of segregated neighborhood schools (186a-187a).

The court of appeals reviewed the different estimates of the district court and of the Charlotte-Mecklenburg School Board concerning the costs of the additional bussing required by the district court's order and affirmed the district court's findings on the issue, as well as on all other issues, as not clearly erroneous (191a-194a). This is the only discussion of bussing costs set out in the opinion. The court of appeals did observe that bussing is a permissible tool for achieving integration, that it is not new or unusual, that 54.9% of all North Carolina pupils are bussed an average daily round trip of 24 miles at an annual cost of over $14 million, and that the Charlotte-Mecklenburg School District currently busses approximately 23,600 pupils and another 5,000 ride common carriers (194a).

The court of appeals asserted that a school board should view the desirability of bussing to achieve integration in the same light as bussing is viewed in connection with other "legitimate improvements" in the school system, such as consolidating schools and locating new school facilities (194a). Specifically, the court listed five considerations that a school board should take into account in utilizing bussing as a tool for achieving integration: (1) the age of the pupils involved, (2) the distance they must be bussed, (3) the time required to bus them, (4) the effect on traffic and (5) the cost in relation to the school board's resources (194a).

Finally, the court of appeals held that the district court's order insofar as it dealt with elementary school pupils would require the respondent School Board to undertake additional bussing so extensive as to constitute an unreasonable means of desegregating the schools. In support of this holding the court of appeals reasoned that the district court's elementary school plan would require 9300 pupils to be bussed in 90 additional busses, that most of the bussed children

would be blacks in grades 1 through 4 and whites in grades 5 and 6, that the average round trip would be 15 miles through central city and suburban traffic, that the district court's plan would involve a 39% increase in the number of bussed children and a 32% increase in the size of the School Board's fleet of busses, and that the number of children bussed would be increased by 56% and the bus fleet by 49% if the additional bussing for junior and senior high school students approved by the court of appeals were included in the calculations (198a).

SUMMARY OF ARGUMENT

1. Even if the "reasonable means" test formulated by the court of appeals were an appropriate standard for review of district court desegregation orders, the court of appeals should have concluded in this case that the additional bussing required by the district court was a reasonable means to desegregate the Charlotte-Mecklenburg elementary schools. The cost of the additional bussing would be very small as compared to the resources available to the School Board, and the educational benefits that would be realized by black school children would far outweigh the relatively minor financial costs. The bussing of elementary school students is not rendered unreasonable because of their age. In North Carolina 70.9% of all bussed pupils attend elementary schools. Furthermore, the younger a black child is when he begins attending desegregated schools, the greater the substantial educational benefits arising from a desegregated education will be. The average distance that the students would be bussed under the district court's order is less than half the average distance that students are now bussed to school by the School Board. The time that would be spent on the bus is well within generally recommended limits. The effects of the additional bussing on traffic would be negligible. Finally, the percentage increase in students bussed and busses needed is directly attributable to the failure of the School Board to proceed sixteen years ago to desegregate the schools with all deliberate speed. Had the appro-

priate steps been initiated then to achieve desegregation within the school system, the increment in busing at this time would be modest indeed.

2. The "reasonable means" test is an inappropriate standard for review of a district court desegregation order. The test, at least as conceived by the court of appeals, suggests that bussing should be considered as a tool for achieving school desegregation in the same light that it is considered "for other legitimate improvements, such as school consolidation. . . ." This approach fails to recognize that the constitutional rights of Negro school children are at stake, and that school boards are charged with the duty to take "whatever steps might be necessary" to desegregate dual school systems. *Green v. School Board of New Kent County*, 391 U.S. 430, 437-38 (1968). *Green* calls for a somewhat different standard of review, one that emphasizes the "heavy burden" upon the proponent of the less effective desegregation plan before the court. This burden should be at least as heavy as the "compelling governmental interest" test applied in other equal protection cases involving fundamental constitutional rights. *E.g., Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). The rights involved in this case are no less fundamental and should not be denied by rejection or modification of the most effective desegregation plan before the court unless a compelling governmental interest necessitates such rejection or modification. No compelling governmental interest was shown here.

3. Under *Green v. School Board of New Kent County, supra*, the "heavy burden" or, as we suggest, "compelling governmental interest" standard applies in all cases, without exception, where a district court has before it a more effective plan to desegregate a dual system than that proposed by the local school board. *A fortiori*, the test should apply in cases such as the one at bar. Here, as both of the lower courts found, the neighborhood schools that would remain black absent the additional bussing required by the district court are black as a result, in part, of governmentally caused residential segregation. When the School Board, under these

circumstances, insists on a "neighborhood school" system, it effectively classifies pupils on the basis of race, and racial classifications can stand, if at all, only where they are justified by a "compelling governmental interest."

ARGUMENT

I

The Additional Bussing Required by the District Court's Order Constituted a "Reasonable Means" of Desegregating the Charlotte-Mecklenburg Elementary Schools.

The "reasonable means" test applied by the court of appeals was not in our view an appropriate standard for review of the district court's order, but we shall assume that it was for the purposes of this Part I of our Argument. We deal in Parts II and III, *infra*, with what we believe the School Board's minimum burden should have been to justify reversal of the district court's ruling.

It is not at all clear from the court of appeals opinion why the court found the additional bussing required by the district court's order to impose an unreasonable burden upon the School Board. Presumably, the court applied the five factors that it said a school board should take into consideration in determining who should be bussed where. The only alternative analysis that may be made of the court of appeals opinion is that the court found the additional bussing unreasonable simply because it constituted too great a relative increase in the number of children bussed and in the number of busses needed to transport them. In either event, in the judgment of NEA based upon the analysis below, the additional bussing called for by the district court is a "reasonable means" of desegregating the schools.

A. *Costs.* Perhaps the most significant among the factors enumerated by the court of appeals is the cost of bussing in relation to a school board's resources. In this connection, the court appears to have concentrated more upon

the dollars involved than upon the sufficiency of the Board's resources to absorb their expenditure.

The district court found that the additional cost to the School Board would amount to $672,000 during the first year ($186,000 of operating expense and $486,000 in capital outlay to purchase new busses) and $186,000 for each year thereafter (156a-157a), that the School Board now spends approximately $500,000 on bussing annually, out of a total operating budget of $51 million, and that local sources (as opposed to federal and State sources) now provide about $25 million a year to the school system. (138a-139a). Thus, the cost of the existing and additional bussing would be about 1.3% of the School Board's total operating budget and about 2.7% of the local funds provided annually to the Board. Nationally, schools devote approximately 4.3% of net current expenditures to transportation. O. Furno, *et al.*, "Cost of Education Index 1969-70," *School Management* 42-43 (January, 1970).

On remand, the district court found that the School Board already had 107 of the 138 busses that would be needed to provide the additional transportation required by the court's desegregation plan for all grades, that the State of North Carolina had 400 second-hand busses that it had offered to lend without cost to school boards for use in 1970-71, that the School Board would face no immediate need to invest in new busses, that the School Board's total budget for 1970-71 was $8 million higher than for 1969-70 and provided that $21.9 million was available for unrestricted use, and that the State, which has regular budgetary surpluses, pays almost all of the costs of operating the Charlotte-Mecklenburg school busses (Memorandum of Decision and Order, August 3, 1970, pp. 18-23). In short, the additional costs involved were found well within the capability of State and local governments to bear them. See, also, the discussion at pp. 23-24, *infra.*

The reasonableness of the costs here involved must also be measured against the value of what is being purchased.

These expenditures are not made just for transportation. They also buy increased educational opportunities, particularly for the black child.

Among educators there is virtually no question that the quality of schooling for ghetto younsters should be upgraded and efforts should be made to overcome the effects of racial isolation. The value of desegregation in this connection was demonstrated in an extensive study prepared for the Office of Education (HEW). That study showed that the achievement of Negro children is strongly influenced by the "educational backgrounds and aspirations of the other students in the school." The study further found that the principal difference in the school environments of white and black students is "the composition of their student bodies." J. Coleman, *Equality of Education Opportunity* 22 (1966).

The data collected by the Office of Education were reanalyzed for the United States Commission on Civil Rights. This re-examination confirmed the "importance of the student environment of the school" and showed that "segregated Negro students are most likely attending class with other students of a very low social class." Furthermore, the study showed that even when the social class of the student and his school are held constant, there still is "an upward trend in average achievement level as the proportion of white classmates increases." Thus, improved "social class level of the school . . . may not be the only source of benefit for Negro students in desegregated situations. There is also evidence that the racial composition, as distinguished from the social class composition of the school, has an important influence." U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* Appendices 40 (1967). This, in general, may be attributable to the better educational atmosphere produced when "the majority of the children . . . do not have problems of self confidence due to race and the schools are not stigmitized as inferior." Id. at 105.

The most comprehensive compilation to date of the educational effects of desegregation concluded:

> 1. Academic achievement rises as the minority child learns more while the advantaged majority child continues to learn at his accustomed rate. Thus, the achievement gap narrows.
>
> * * * *
>
> 2. Negro aspirations, already high, are positively affected; self-esteem rises; and self-acceptance as a Negro grows.
>
> * * * *
>
> 7. Virtually none of the negative predictions by anti-desegregationists finds support in studies of actual desegregation.
>
> M. Weinberg, *Desegregation Research: An Appraisal* 378-379 (2d ed. 1970).

These conclusions rest on a study of about 300 surveys of school desegregation. See, also, the findings of the district court in this case indicating that in Charlotte blacks in desegregated schools perform better than blacks in all-Negro schools (97a-98a).

The cost of additional bussing to achieve desegregation should also be measured against the cost of compensatory education programs that may be utilized in an effort to make up for the disadvantages of a segregated school. A review of several such programs by the U.S. Commission on Civil Rights indicates that they are quite expensive. A New York City experimental project cost $80 per junior high school student and up to $250 for a student in senior high school. U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 123 (1967). When the program was broadened to include more children, the cost ranged from $50 to $60 per child. *Id.* at 124. A Syracuse, N. Y., program experienced expenses of $100 per child for elementary and junior high students. *Id.* at 128. The lowest cost mentioned among the programs reviewed by the Commission was $35 per student in Philadelphia. *Id.* at 132. These

costs are substantially higher than the $20 per pupil cost for the additional bussing required by the district court in this case. Moreover, the results of the programs reviewed, insofar as achievement is concerned, were far less encouraging than those that can be expected from desegregated classes. *Id.* 128-140.

In short, NEA's position is that bussing costs, when incurred as part of a plan for desegregating schools, cannot be written off as mere transportation expenses. They provide real educational benefits to the disadvantaged youngsters in the ghetto, and those children, generally speaking, sorely need special attention in order to mitigate the adverse effects of racial isolation. The financial costs anticipated here are reasonable enough when viewed in connection with the financial resources available to bear them. They are more reasonable still when one considers what they will buy in the way of educational benefits for those children who have yet to realize the promise of desegregated schools, and the greater cost of less satisfactory compensatory education alternatives.

Finally, that it may cost money to vindicate the constitutional rights of black children in Charlotte's elementary schools is no reason to leave those rights in limbo. In *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), this Court held that the "saving of welfare costs" could not justify what would otherwise amount to a deprivation of an individual's right to equal protection of the laws. The costs there involved were far greater than those here in issue. And in *Griffin v. County School Board*, 377 U.S. 218, 233 (1964), the Court declared that in fashioning relief from continuing racial discrimination in connection with public education in Prince Edward County, Virginia, the district court might require the local authorities "to levy taxes to raise funds" to operate desegregated schools.

B. *Age.* Another factor considered by the court of appeals is the age of the students to be bussed. Among the findings of the district court, which were accepted by

the court of appeals, were that 9,300 additional children in grades 1 through 6 would be transported (155a) and that travel by school bus is safer than walking to school or riding there in private vehicles (140a). The district court had earlier noted that first graders "may be the largest group" among the 23,600 students that are currently being bussed by the School Board (22a). Judge Winter, concurring in part and dissenting in part in the court of appeals, observed (221a-222a) that the Charlotte-Mecklenburg School Board busses a far lower percentage (21%) of students than does North Carolina as a whole (54.9%). Statewide, 38.7% of all enrolled students (70.9% of all bussed students) are bussed to elementary schools (137a). Under the district court's order, a total of 43.6% of all Charlotte-Mecklenburg students will be bussed, and this figure includes substantial numbers of students bussed to junior and senior high schools. (186a, 138a, 157a) Thus, the percentage of elementary school students that will be bussed under the district court's order compares favorably with the percentage of elementary school students bussed statewide.

The district court's subsequent decision on August 3 included findings that currently more elementary school children than high schoolers are bussed in Charlotte-Mecklenburg and that four- and five-year olds are transported on the longest bus routes in the system (Memorandum of Decision and Order, August 3, 1970, pp. 23-24).

School children of all ages can be and are bussed to schools throughout the nation every day. During the 1969-70 school year some 18 million children were bussed to public schools in America. NEA, National Commission on Safety Education, *1968-1969 Statistics on Pupil Transportation* (1970). This amounted to approximately 39% of the estimated 45.5 million total public school population. NEA Research Division, *Estimates of School Statistics, 1969-70* (1969).

On the other hand, the age of the child probably has a crucial influence on the effectiveness of school desegrega-

tion. There is widespread, if not universal, recognition among educators that the critical years in the educational process are the early school years. In this formative period, the school system has the greatest opportunity to help the child develop mental discipline, appropriate social attitudes and fundamental skills, such as reading. See, for example, B. Bloom, *Stability and Change in Human Characteristics* 215-16 (1964).

For children from whom educational opportunity has historically been withheld, the early years are probably even more important. These children, as they progress through school, show a cumulative deficit. They often begin school with inadequate language skills, insufficient perceptual skills, shorter attention spans, and poorer motivation. With age, the child's linguistic patterns harden. The gap between his reading skills and those of his middle class peers enlarges. By the time the child reaches the eighth grade he is about three years behind the grade norms for reading, arithmetic and a variety of other subjects. B. Bloom, *et al., Compensatory Education for Cultural Deprivation* 73-74 (1965).[5]

As one would expect, then, the beneficial effects of desegregation are likely to be greatest in the lower grades. In Charlotte, as the district court found on remand, achievement test scores demonstrate that the higher the grade at which schools are first desegregated, the greater are the academic penalties that black children will incur (Memorandum

---

[5] Compare the results of a survey made by the U.S. Office of Education reported in U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 14 (1967): "Negro and white students in metropolitan areas begin school with a noticeable difference in verbal ability. At sixth grade, the average Negro student is about one and one-half grade levels behind the average white student in verbal achievement. By the time 12th grade is reached, the average white student performs at or slightly below the 12th-grade level, but the average Negro student performs below the 9th-grade level. Thus, years of school completed has an entirely different meaning for Negroes and whites."

of Decision and Order, August 3, 1970, pp. 7-8, 16). More generally, "those [black] students who first entered desegregated schools in the early grades do generally show slightly higher average scores [on achievement tests] than the students who first came to desegregated schools in later grades." J. Coleman, *op. cit. supra,* at p. 331. To the same effect, see M. Weinberg, *op. cit. supra,* at p. 58; Report to the Board of Regents of the University of the State of New York, *Racial and Social Class Isolation in the Schools* 18, 238 (1969). Thus, if the optimum educational advantages of desegregation are to be obtained, desegregation should begin with the youngest pupils in the system.

In short, to the extent that the age of the children to be bussed to achieve desegregation is weighed in evaluating the "reasonableness" of the bussing, the younger the black child, the more he will benefit from the bussing. The added educational benefits of desegregation in the early grades more than outweigh the disadvantages, if any, that bussing might entail.

C. *Distance.* A third factor cited by the court of appeals is the distance that the children would be bussed. The district court found that the average length of a one-way bus trip in the school system was over 15 miles, while the average one-way trip for elementary school students under the court's plan would be less than 7 miles, which distance was obtained by the method used by the county school bus superintendent, *i.e.*, taking the straight line mileage and adding 25% (153a, 183a). On remand, the district court found that four- and five-year-olds today travel from 7 to 39 miles, one way, on the School Board's busses (Memorandum of Decision and Order, August 3, 1970, at p. 17).

The matter of distance, of course, involves for at least some children the question whether they are to be schooled in the "neighborhood" or at some more removed location. From the educator's viewpoint, the neighborhood school

has both advantages and disadvantages. See R. Havighurst, "The Neighborhood School: Status and Prospects," in Frazier ed., *A Curriculum for Children* 73-76 (1969) and R. Binswanger, *Address before the American Association of School Administrators*, February 13, 1967. Certainly, as the district court observed (22a), it is far from an unquestioned virtue. One of the foremost authorities in the field is of the view that "there cannot be a really good all-Negro neighborhood school in the United States today." Havighurst, *op. cit. supra*, at 82. See, also, M. Weinberg, *Race and Place* 89 n.5 (1967), and the discussion at pp. 14-15, *supra*.

It must be emphasized in this respect that the remedy fashioned by the district court is not much different than the remedy employed earlier by school authorities in the nation-wide effort to eliminate the educational deprivations of rural America. As a result of that effort the number of single-teacher schools was reduced from 156,066 in 1927-28 to 6,500 in 1965-66. NEA Research Division, *One Teacher Schools Today* 9 (1960); U.S. Office of Education, *Statistics of State School Systems, 1965-1966* 4. Similarly, the number of school systems was reduced from 127,422 in 1931-32, to 18,904 in 1969-70. NEA Research Division, *Estimates of School Statistics, 1969-70* 5-6 (1969). That consolidation eliminated nearby schools for many families and required extensive bussing of children to the villages. It involved costs and inconvenience and aroused resistance over the loss of locally-based schools. But in terms of the improved educational opportunity provided the students, it was worthwhile and constructive. In fact, the most important effect of school consolidations was the educational gains produced by bringing together laboring class children of the farms and middle-class children of the village. Swanson, "Contemporary Challenges: Monitoring Human Inputs into the Schools," *Fiscal Planning for Schools in Transition* in Proceedings of the Twelfth National Conference on School Finance 80-84 (1970).

D. *Time.* A fourth factor mentioned by the court of appeals is the time required to bus the students to and from school. The district court found that the average one-way bus trip under the district court's elementary school plan would take "not over 35 minutes at the most" whereas the average one-way bus trip in the Charlotte-Mecklenburg school system today takes "nearly an hour and a quarter" (153a).

The generally recognized limits on the amount of time that a student should be bussed were formulated in 1948 by the National Commission on School District Reorganization. That Commission laid down the minimum staff and enrollment levels which are consistent with the educational interests of the children. The Commission, however, counseled school planners that:

> In more sparsely populated areas, the need to transport children to and from school makes it desirable to modify these standards. It may be detrimental to the physical and emotional well-being of children to keep them on the road for long periods; thus, over-zealous efforts to set up desirable situations for the provisions of a good educational program may seriously undermine one of its most important elements. The best information available indicates that:
>
> 1. The time spent by elementary children in going to and from school should not exceed 45 minutes each way.
> 2. The time spent by high school pupils in going to and from school should not exceed an hour each way.
>
> NEA, Department of Rural Education, *Report of the National Commission on School Reorganization* 81-82 (1948).

No development since these standards were formulated suggests that they are outmoded. The bussing prescribed by the district court is well within them.

E. *Traffic.* Lastly, the court of appeals mentioned the effect of the bussing on traffic. The court noted that the bussing required by the district court would run through central city and suburban traffic and that (193a) "large numbers of school buses themselves generate traffic problems that only experience can measure." Judge Sobeloff, in his separate opinion dissenting in part and concurring in part, found in the record "no evidence of insurmountable traffic problems due to the increased bussing." He also doubted whether the additional busses would have very much of an impact in an area in which estimated automobile trips per day approximate 870,000. The district court found that the School Board already operates 279 busses within the school district and that the court's desegregation plan would involve "no serious extra load on downtown traffic because there will be no pickup and discharge of passengers in downtown traffic areas" (142a, 143a).[6]

F. *Percentage increase.* The additional bussing of elementary school pupils required by the district court's order

---

[6]On remand, the district court made findings which clearly establish that the traffic problem is an unreal one (Memorandum of the Decision and Order, August 3, 1970, at pp. 24-25):

> The county has over 160,000 passenger vehicles and nearly 30,000 trucks registered in it. It is estimated that the total number of automobile trips in the county daily other than truck trips is over 869,000. Traffic is heavy in most part of the county. Since the so-called "cross-bussing" of the Finger plan or the minority plan will not contemplate pick up and discharge of pupils in the central business area, the busses added by the Finger plan or the minority Board plan will provide very little interference with normal flow of traffic. School busses are no wider than other busses (the law requires that this be so); they already use all the major streets and traffic arteries in the county and city every school morning of the year. There is no evidence to show that adding 138 school busses to the volume of existing traffic will provide any such impediment as should be measured against the constitutional rights of children. It would also appear that a school bus transporting 40 to 75 children should reduce traffic problems by cutting down on the number of automobiles that parents might otherwise be driving over the same roads.

does represent a substantial percentage increase in the total number of pupils bussed by the school board (39%) and in the total number of busses needed to transport them (32%). This increase is substantial, however, simply because the district court's order in one sweep invoked measures that in large part should have been taken over the last sixteen years. Had the school board begun in the 1954-55 school year to desegregate its elementary schools by providing each year 1/17th of the additional bussing called for by the district court, so that 100% of such bussing would be provided for the first time in the 1970-71 school year, the percentage increase from 1969-70 to 1970-71 in the number of students bussed and the number of busses needed for them would be only 1.69% and 1.45% respectively. The capital outlay for new busses during the period would have been only $28,000 per year, including 1970-71. The lump-sum capital outlay that would be required *now* by the district court's order if new busses had to be purchased approaches a half million dollars simply because outlays of capital to achieve desegregation as required by law were not forthcoming during the previous sixteen years.

The sizeable percentage increase in pupils bussed and busses needed resulting from the district court's order is thus directly attributable to the failure of the School Board to desegregate the schools during the years that have elapsed since 1954. Furthermore, "the actions of the present school board and others, before and since 1954, in locating and controlling the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods" (87a) have affirmatively added to the problem. To hold with the suggestion of the court of appeals that additional bussing may not be a "reasonable means" of achieving desegregation where it involves too "extensive" an increase is to reward school districts for delaying desegregation—and augmenting separate facilities in the interim—to the point where such extensive increases are necessary. The size of the percentage

increases in bussing simply does not warrant consideration in the "reasonableness" equation.

In sum, NEA believes the desegregation plan for elementary schools ordered by the district court was a reasonable and effective means of desegregating this portion of the school system. Since there was no more effective desegregation plan before the district court, its order should have been affirmed by the court of appeals. *Green v. School Board of New Kent County*, 391 U.S. 430 (1968). Accordingly, this Court should reverse the ruling of the court of appeals and reinstate the district court's order. However, in so doing the Court should not embrace the "reasonable means" test as a standard for review of desegregation orders. We turn now to a consideration of that issue.

II.

The Court of Appeals Should Have Reviewed the District Court's Order Not by the Standard of Whether It Provided for "Reasonable Means" for Effectuating Desegregation, but by Determining Whether Its Modification Was, at the Least, Necessary To Serve a Compelling Governmental Interest.

The court of appeals' opinion appears to draw a line beyond which a district court may not go in providing effective relief to remedy the established unconstitutional deficiencies of dual school system: A district court may require whatever desegregation may be achieved by "reasonable means," but where the remnants, no matter how large, of a dual school system cannot be disestablished by "reasonable means", they need not be disestablished at all. We have demonstrated above that the additional bussing of elementary school pupils required by the district court constituted a "reasonable means" of achieving desegregation and so met the new test formulated by the court of appeals. We argue here that that test itself is an improper one.

The obligation to desegregate a dual school system may well be an absolute duty that may not be avoided in any part on any ground. We do not, however, reach that question, nor need this Court in order to reverse the decision of the court of appeals. At the least, one who seeks to overturn or modify an effective desegregation plan ordered by a district court must demonstrate that such a reversal or modification is necessary to serve a compelling governmental interest. No such interest was shown here.

What are "reasonable means" to achieve desegregation and what are not may all too easily be determined without sufficient recognition that the fundamental and immediate rights of thousands of black school children to an education in desegregated public schools is at stake. *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969). The court of appeals in this very case made just such an error. It indicated that bussing, as a means of achieving desegregation, should be viewed "in the light" that it is viewed "for other legitimate improvements, such as school consolidation and the location of new schools" (194a). Although a school board may decide against a proposed school consolidation or particular location for a new school on the ground that the proposal would require additional bussing that the school board, rightly or wrongly, deems undesirable, the constitutional rights of a large minority of the school population to a desegregated education cannot be made to rise or fall on a similarly nice policy judgment. This Court in *Green v. School Board of New Kent County*, 391 U.S. 430, 436, 437-38, 442 (1968), asserted that to vindicate the "constitutional rights of Negro school children" school boards are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert a unitary system in which racial discrimination would be eliminated root and branch" and to "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Green* did not limit this duty to taking only the action that a school board (or court) might

consider reasonable in order to obtain other legitimate educational improvements, such as consolidating old schools or locating new ones. *Green* called for "whatever" steps may be necessary.

In addition, the "reasonable means" standard is exceedingly vague and openly invites circumvention of the constitutional right of black children to equal educational opportunities. As Judge Sobeloff observed below (212a-213a):

> Handed a new litigable issue—the so-called reasonableness of a proposed plan—school boards can be expected to exploit it to the hilt. The concept is highly susceptible to delaying tactics in the courts. Everyone can advance a different opinion of what is reasonable. Thus, rarely would it be possible to make expeditious disposition of a board's claim that its segregated system is not "reasonably" eradicable. Even more pernicious, the new-born rule furnishes a powerful incentive to communities to perpetuate and deepen the effects of race separation so that, when challenged, they can protest that belated remedial action would be unduly burdensome.

Green v. School Board of New Kent County, supra, establishes, or at least points to, a different standard by which the appropriateness of a desegregation plan ordered to be implemented by a district court should be measured. Where two plans for desegregation are before a district court, *Green* requires that the proponent of the plan that does the less effective job of desegregating the schools bear a "heavy burden" to justify its implementation. *A fortiori,* where a school board challenges a district court order requiring implementation of the more effective plan, that is, the plan that promises to work best now, it should bear a heavy burden to show why the more effective plan should not be carried out.

We read this language in *Green* as requiring a school board to carry a burden at least as heavy as this Court has imposed in equal protection cases involving fundamental constitutional rights arising in contexts other than racial discrimination, *i.e.*, rejection or modification of the more

effective desegregation plan must be shown to be necessary in order to serve a compelling governmental interest.

In *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), this Court struck down a welfare benefit waiting period because it served to penalize the exercise of the constitutional right to travel among the several states and had not been "shown to be necessary to promote a compelling governmental interest." The Court recognized that the waiting-period provisions resulted in a considerable savings of welfare costs, but this interest was not sufficiently compelling to justify inhibiting the exercise of constitutional rights. In *Williams v. Rhodes*, 393 U.S. 23, 24, 31 (1968), Ohio election laws making it "virtually impossible" for a new political party to obtain a place on the ballot to choose electors for the Presidency and Vice Presidency of the United States were invalidated. The rights of individuals to join together to advance their political beliefs and effectively to cast their votes were adversely affected by the Ohio statutes. This Court, quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963), held that only a compelling state interest, which Ohio had failed to show, could justify the infringement. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), held that a state could not disqualify a person for unemployment benefits because she was unavailable to work Saturday where her unavailability was due to the exercise of her religious beliefs. The Court considered "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right" and found none. See, also, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Carrington v. Rash*, 380 U.S. 89, 96 (1965); *Kramer v. Union School District*, 395 U.S. 621, 626-27 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960).

In this case the no less fundamental rights of Negro school children to be freed completely of the disabilities of a dual school system are in issue. *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969). These are rights that are personal to each black child assigned to a

segregated school. *Sweatt v. Painter*, 339 U.S. 629, 635 (1950). A black child assigned to a black school such as Double Oaks or Lincoln Heights (126a, 127a) is afforded little consolation—and no vindication of his personal and immediate constitutional rights—by the fact that the School Board may afford other students an integrated education. In these circumstances a compelling governmental interest must be shown to justify school assignments that would infringe upon such rights by failing to desegregate the Charlotte-Mecklenburg elementary schools as effectively as the district court's order.

The question is how far the School Board must go to see to it that the constitutional rights of black school children are in fact realized. The answer, in our view, is that the School Board must go as far as it is necessary for it to go to eliminate the racial identity of schools within the system. It may stop short, if at all, only where a compelling government interest so warrants. The governmental interests involved in this case, both educational and financial, have been reviewed in detail in Part I of this Argument. They may not fairly be described as "compelling."

III.

In Any Event, Where a Black Residential Area Has Been Created in Part by State Action, a Compelling Governmental Interest, at the Least, Must Be Shown To Justify a Failure To Disestablish the Racial Identity of the Schools Within That Area.

Certainly, where a classification is based upon race, the need to show a compelling governmental interest is underscored. *Cooper v. Aaron*, 358 U.S. 1, 16 (1958), rejected the contention that school desegregation in Little Rock, Arkansas, be postponed because otherwise civil violence and disruption, albeit inspired by state officials, would ensue. The Court observed that as far back as *Buchanan v. Warley*, 245 U.S. 60, 81 (1917), it had ruled that a zoning ordinance separating residential areas by race

could not be defended on the grounds that it would promote public peace by preventing race conflicts. See, also, *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). A classification based upon race is precisely what is in issue here.

Only additional bussing of the magnitude required by the district court can effectively eliminate the racial identity of the elementary schools in the Charlotte black ghetto (146a, 171a). The district court found (12a-14a, 86a-87a), and the court of appeals agreed (186a), that this segregated residential area was in part the work of federal, state and local governments. If only "reasonable means" need be used to desegregate the schools in the ghetto, and if the requisite additional bussing is not such "reasonable means", governmental authorities will be authorized to perpetuate a racially segregated dual school system by dividing neighborhoods by race and drawing geographic school zones upon those segregated neighborhoods. We contend that under these circumstances a compelling governmental interest, at the least, must assuredly be shown to justify use of a plan that will not desegregate the black neighborhood schools. Otherwise government would too readily be authorized to accomplish indirectly what it could not do directly, *i.e.*, separate students by race.

The district court found that (86a-87a):

> . . . [the] facts are that the present location of white schools in white areas and of black schools in black areas is the result of a varied group of elements of public and private action, all deriving their basic strength originally from public law or state or local governmental action. These elements include among others the legal separation of the races in schools, school busses, public accommodations and housing; racial restrictions in deeds to land; zoning ordinances; city planning; urban renewal; location of public low rent housing; and the actions of the present School Board and others, before and since 1954, in locating and controlling

> the capacity of schools so that there would usually be black schools handy to black neighborhoods and white schools for white neighborhoods.

In more detail, the district court found that under the city's urban renewal program, thousands of Negroes were moved from the center of town west to the least-restrictively-zoned areas, that while this relocation involved many decisions by individuals and governments at various levels, it "occurred with heavy Federal financing and with active participation by the local governments, and it has further concentrated Negroes until 95% or so of the city's Negroes live west of the Tryon-railroad area, or on its immediate eastern fringes," and that the School Board located new schools so as separately to serve the black population relocated to the northwest and the white population moving generally south and east so that such schools became black or nearly black in the northwest and white or nearly white in the east and southeast (13a-14a).

Governmental involvement in Charlotte's residential segregation is also historically evident. After *Buchanan v. Warley*, 245 U.S. 60 (1917), outlawed compulsory residential segregation, a principal impetus to neighborhood segregation was legal recognition and judicial enforcement of racially restrictive covenants.[7] The United States has taken the position that these become "in effect a local zoning ordinance binding those in the area subject to the restric-

---

[7] The Supreme Court of North Carolina held such covenants legally enforceable as late as 1946. *Vernon v. R. J. Reynolds Realty Co.*, 226 N.C. 58, 36 S.E. 2d 710 (1946); *Phillips v. Wearn*, 226 N.C. 290, 37 S.E. 2d 895 (1946); *Eason v. Buffaloe*, 198 N.C. 520, 152 S.E. 496 (1930). In *Phillips* the Court upheld a racial restriction in a deed to a tract of land covering 380 lots in the eastern section of Charlotte, which it described as providing "[p]roperty not to be owned or occupied by persons of the negro race." 37 S.E. 2d at 896. In 1948 this Court held such covenants unenforceable. *Shelley v. Kraemer*, 334 U.S. 1.

tion . . . ."[8] Also, policies followed by the Federal Housing Authority and by local government in connection with public housing projects hage fostered residential segregation.[9]

In sum, the findings of fact made by the district court as well as the historical record of governmental action requiring and supporting residential segregation in Mecklenburg County provide ample support for that court's conclusion (87a) that Charlotte's black residential areas are the result of "so much state action . . . that the resulting segregation is not innocent or 'de facto.'" It is well established that " . . . the involvement of the State need [not] be exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral or its action was only

---

[8] Brief of the United States in *Bell v. Maryland*, 378 U.S. 226 (1964), as quoted at 329 n. 16. See, also, the discussion of the grounds for decision of *Shelley v. Kraemer*, *supra*, in *Bell v. Maryland*, *supra*, at 328 *et seq.* (dissenting opinion of Mr. Justice Black).

[9] The FHA was urging racially restricted neighborhoods as late as 1938 and continued to treat racial integration as a reason to deny an application for mortgage insurance even after *Shelley v. Kraemer*, *supra*. See U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 254-255 (1967). State and local governments likewise fostered residential segregation in their administration of public housing projects long after *Shelley*. Segregated projects in Philadelphia for Negroes and whites were approved in *Favors v. Randall*, 40 F. Supp. 743 (E.D. Pa. 1941) and in 1955, the constitutionality of segregated projects in Detroit was being contested in the courts. *Detroit Housing Commission v. Lewis*, 226 F.2d 180 (6th Cir.). Even as late as 1969, federal courts were finding cities such as Chicago and Lansing, Michigan, to have maintained racially discriminatory policies for *Gautreaux v. Chicago Housing Authority*, 196 F.Supp. 907 (N.D. Ill. 1969); *Ranjel v. City of Lansing*, 293 F. Supp. 301 (W.D. Mich. 1969), *reversed on other grounds*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970).

only one of several cooperative forces leading to the constitutional violation." *United States v. Guest*, 383 U.S. 745, 755-756 (1966). In *Evans v. Newton*, 382 U.S. 296, 299 (1966), the Court declared, "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." See, also, *Marsh v. Alabama*, 326 U.S. 501 (1946); *Terry v. Adams*, 345 U.S. 461 (1953); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Under these circumstances, the Fourteenth Amendment requires that the school board avoid freezing black students into racially identifiable neighborhood schools. A State may not locate people in particular residential areas because of their race and then put them in all-black schools because of where they live. To do so is simply to put black neighborhood children in black neighborhood schools because they are black. This, under *Brown*, violates the Fourteenth Amendment.

A long line of lower court decisions holds that when residential racial segregation is caused in part by state action, a school board may not maintain neighborhood schools if to do so means perpetuation of all black schools. *Henry v. Clarksdale Munic. Sep. School District*, 409 F.2d 682, 689 (5th Cir. 1969), *cert. denied*, 396 U.S. 940 (1969); *United States v. Greenwood Munic. Sep. School District*, 406 F.2d 1086, 1093 (5th Cir. 1969), *cert. denied*. 395 U.S. 907 (1969); *Valley v. Rapides Parish School Bd.*, 423 F.2d 1132 (5th Cir. 1970); *United States v. Board of Education of Baldwin County, Ga.*, 423 F.2d 1013 (5th Cir. 1970); *Kemp v. Beasley*, 423 F.2d 851 (8th Cir. 1970). *United States v. School Dist. 151 of Cook County, Ill.*, 286 F.Supp. 786, 798 (N.D. Ill. 1968), *aff'd*, 404 F.2d 1125 (7th Cir. 1968); *Dowell v. School Board of Oklahoma City*, 244 F.Supp. 971 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967); *Spangler and United States v. Pasadena City Bd. of Ed.*, 311 F. Supp.

501 (C.D. Calif. 1970); *Keyes v. School District No. 1, Denver*, 303 F.Supp. 79, 289 (D. Colo. 1969); see *Cato v. Parham*, 302 F.Supp. 129 (E.D. Ark. 1969). But see *Deal v. Cincinnati Board of Education*, 419 F.2d 1387, 1391-92 (6th Cir. 1968).

These rulings represent an application of the accepted proposition that, by indulging in one unconstitutional act (the causing of residential segregation), a state is barred from engaging in action otherwise within its power (neighborhood student assignment) because such action would perpetuate the unconstitutionality. Thus, an otherwise valid voter qualification may not be applied where it would raise standards above those applicable at a time when Negroes were discriminatorily excluded from the franchise, at least where white persons registered during such time remain on the registration rolls. *Louisiana v. United States*, 380 U.S. 145 (1965); *United States v. Duke*, 332 F.2d 759 (5th Cir. 1964). See, also, *United States v. Ward*, 349 F.2d 795 (5th Cir. 1965) (requirement that voting applicant be identified by previously registered voters, who were all white); *United States v. Manning*, 205 F.Supp. 172, 173-174 (W.D. La. 1962) (same); *Ross v. Dyer*, 312 F.2d 191 (5th Cir. 1962) (requirement that siblings attend same school); *Board of Education Oklahoma City v. Dowell*, 375 F.2d 158 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967) (same); *Franklin v. Parker*, 223 F.Supp. 724 (M.D. Ala. 1963), *modified and aff'd adopting the opinion of the district court*, 331 F.2d 841 (5th Cir. 1964) (requirement that graduate student have graduated from accredited college where Negroes could not attend any accredited college in the State); *Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962), *cert. denied*, 371 U.S. 828 (1962) (requirement of alumni sponsorship where there are no black alumni); *Hunt v. Arnold*, 172 F.Supp. 847 (N.D. Ga. 1959) (same). This is also the rationale of cases like *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Miranda v. Arizona*, 384 U.S. 436 (1966): Constitutional protection becomes meaningless unless courts are watchful to nullify otherwise unobjectionable actions that serve to perpetuate the constitutional wrong.

Additionally, there are cases, such as *Brewer v. School Board of City of Norfolk*, 397 F.2d 37 (4th Cir. 1968),[10] and *Spangler and United States v. Pasadena City Bd. of Ed.*, 311 F.Supp. 501 (C.D. Calif. 1970), which strongly suggest that a school board may not maintain neighborhood schools for neighborhoods that are segregated as a result of private racial discrimination. These are consistent with the cases holding that the government may not encourage, extend, build upon, or involve itself in private discrimination. *E.g., Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957) (the State is forbidden by the Fourteenth Amendment from carrying out the racially discriminating provisions of a private will); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Keyes v. School District No. 1, Denver*, 303 F.Supp. 279, 289 (D. Colo. 1969). Here the black residential area in Charlotte was found to be the result of government action. Accepting the suggestion in *Brewer* that proof of private racial discrimination is enough, this case, where government action is involved, is *a fortiori*.

Steps short of eliminating the racial identity of ghetto schools under such circumstances will not do. *Green v. School Board of New Kent County*, 391 U.S. 430 (1968), and *Monroe v. Board of Commissioners of the City of Jackson*, 391 U.S. 450 (1968), indicate the constitutional inadequacy of at least one of the alternatives suggested by the court of appeals—freedom of transfer with transportation. Negro students may not be assigned to all-black schools

---

[10] In *Brewer*, the court instructed the district court to determine whether "the racial pattern of the districts results from racial discrimination with regard to housing" and concluded, "[a]ssignment of pupils to neighborhood schools is a sound concept, but it cannot be approved if residence in a neighborhood is denied to a Negro pupil solely on the ground of color." The court went further saying that it is immaterial that the residential patterns are the result of private discrimination: "The school board cannot build its exclusionary attendance upon private racial discrimination." 397 F.2d at 41-42.

and then asked to bear the burden of choosing a desegregated experience. *Ramey v. Board of Education of the Gould School District*. 391 U.S. 443, 447-48 (1968). The other alternatives suggested by the court of appeals are equally insufficient. Special integrated classes not only represent token desegregation that fails to comply with constitutional requirements, but they also may well be harmful to otherwise segregated blacks by reinforcing the feeling of inferiority that is so harmful to education. U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* 128 (1967). Subsequent assignment to integrated classrooms is not only contrary to the dictates of *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 20 (1969), that schools be desegregated now and that no black student be "effectively excluded" from a classroom because of race, but it also deprives that student of the full benefits of a desegregated education that may be realized only if he is assigned to an integrated school at an early age. See pp. 18-19, *supra*.

In sum, where there is neighborhood segregation in part caused by state action, at the very least a school board may not retain neighborhood zones which result in segregated schools absent a compelling governmental interest necessitating the retention of those boundaries. In this case no compelling governmental interest was shown to justify such racial classifications.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed and that part of the order of the district court vacated by the court of appeals reinstated.

Respectfully submitted,

STEPHEN J. POLLAK
BENJAMIN W. BOLEY
RICHARD M. SHARP
734 Fifteenth Street, N. W.
Washington, D.C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorneys for Amicus Curiae
National Education Association

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 1[illegible]3 281

SWANN,

Petitioner,

vs.

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION,

Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF APPLICATION TO EXPEDITE CAUSE AND TO CONVENE SPECIAL TERM OF COURT

STATE OF FLORIDA ex rel EARL FAIRCLOTH ATTORNEY GENERAL OF FLORIDA and FLOYD CHRISTIAN, COMMISSIONER OF EDUCATION OF FLORIDA, *Applicants.*

EARL FAIRCLOTH
Attorney General

ROBERT J. KELLY
Deputy Attorney General

RONALD W. SABO
Assistant Attorney General

RIVERS BUFORD and
STEPHEN M. SLEPIN
State Board of Education

Counsel for the Applicants.

AMICUS CURIAE BRIEF IN SUPPORT OF APPLICATION TO EXPEDITE CAUSE AND TO CONVENE SPECIAL TERM OF COURT

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Earl Faircloth, the duly elected Attorney General of the State of Florida, and Floyd Christian, the duly elected Commissioner of Education of the State of Florida, on behalf of all the citizens of Florida and all others similarly situated, respectfully request that this Court expedite final disposition of this cause through the convening of a Special Term of Court, pursuant to Rules 3 and 41 (4) of the Rules of this Court. Earl Faircloth and Floyd Christian further

state their intention to file yet another brief as *amicus curiae* in this cause if a Special Term is convened. Rule 42 (4). As grounds therefor, they state:

I. THIS COURT HAS AUTHORITY TO CONVENE A SPECIAL TERM OF COURT.

It is well established that this Court has the authority to convene a Special Term to hear and decide a particular case. *Ex Parte Quirin*, 317 U.S. 1 (1942); *Rosenberg v. United States*, 346 U.S. 273 (1953); *Cooper v. Aaron*, 358 U. S. 1 (1958). This authority should be exercised where "the public importance of the questions raised [necessitates consideration] without any avoidable delay." *Ex Parte Quirin*, 317 U.S. 1, 19 (1942).

II. THE PUBLIC SCHOOL DESEGREGATION CONTROVERSY HAS ALREADY BEEN FOUND TO WARRANT A SPECIAL TERM OF COURT.

This Court has already found that public school desegregation issues are questions of such great public importance as to warrant a Special Term of court. In 1958 a controversy arose over desegregation of the public schools of Little Rock, Arkansas. Review was sought of various lower federal court orders and this Court stated that since "the opening date of the High School will be September 15," (358 U.S. at 27) that convening of a Special Term was required. This Court then decided the cause in four days (petition for certiorari was filed by September 8 and the decision was announced September 12). *Cooper v.*

Aaron, 358 U.S. 5 (1958), [See 3 L.ed.2d 1-4].

Although the particular legal issues involved in that case might have been different than this one, the overriding general public concern over the desegregation issue remains the same. The perplexing issues still present in this area have escalated, not diminished, since *Cooper* was decided. Thus, this Court must, since it is composed of the only nine individuals on earth who can set these issues to rest, decide this cause now.

The chief distinction between this cause and *Cooper* is that in this cause the Court has already considered and granted the petition for certiorari and the parties have already had considerably more time to prepare their legal

arguments. Furthermore, this Court already has under consideration a motion to expedite the cause.

III. LOWER FEDERAL COURTS ARE IN HOPELESS CONFUSION OVER THE ISSUES PRESENTED BY THIS CAUSE.

The absence of any prior and clear binding pronouncement from this Court on the constitutionality *vel non* of *"de facto vs. de jure"* segregation, the requirement *vel non* of "massive busing" and other issues presented by this case, have left lower federal courts, the federal government, and the nation's school administrators without any guidelines on "the basic practical problems", *Northcross v. Board of Education*, ___U.S.___, 38 L.W. 4219, 4220 (1970) [Burger, C. J.], involved in compliance with constitutional mandates

re "a unitary school system." Chaos, confusion, resentment, defiance, and conflicting decisions have been the results.

It is not necessary to here cite at length the conflicting views adopted by various courts as they attempt to "predict" what the Constitution mandates. A significant number of them have already been collected. *Annot. 11 A. L. R. 3d 780 (1967)* [plus pocket supp.]. The courts of Florida have not found this task any easier and have met with similar conflicting results.

IV. IRREPARABLE HARM WILL OCCUR IF A SPECIAL TERM IS NOT CONVENED.

Failure to provide these "basic practical guidelines" before the next school year is well under way will result

in irreparable harm to the citizens and children of America, no matter which way this case is ultimately decided.

If this Court decides in the middle of the school year that, for example, "de facto segregation" is constitutional, then harm will be great. School districts which will have *already* been under *contrary* lower federal court orders will already have needlessly expended vast sums of taxpayers' money for extra buses, "pairing", etc. School children who will have already been picked up and moved to unfamiliar surroundings will then be told it was all unnecessary. Equally as unnecessary will have been the judicial and administrative time spent in implementing these lower court orders.

On the other hand, if this Court were to rule "de facto segregation" unconstitutional, equally irreparable harm would occur. School boards which will have *already* been under *contrary* lower federal court orders (or none at all) will suddenly have to purchase buses, pair schools, etc. Children will be forcibly moved to new and unfamiliar surroundings on a scale never before imagined. The "hiatus" which occurred last spring would be pale by comparison.

Clearly, if irreparable injury is to be avoided, this Court should provide "the basic practical guidelines" before the nation's school terms are significantly under way. In this case, to all parties concerned, "justice delayed, may well be justice denied." As this Court,

speaking through Chief Justice Marshall, noted over a century ago, in a different context:

> "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass by it because it is doubtful. With whatever doubts, or whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Va.*, 19 U.S. (6 Wheat.) 264, 403 (1821).

WHEREFORE, Earl Faircloth and Floyd Christian respectfully request that this cause be expedited and the Court be convened in a Special Term.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

ROBERT J. KELLY
Deputy Attorney General

RONALD W. SABO
Assistant Attorney General

Counsel for Applicants.

RIVERS BUFORD
General Counsel

STEPHEN M. SLEPIN
General Counsel

Florida State Board of Education

Of Counsel for Applicants.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Amicus Curiae Brief in Support of Application to Expedite Cause and to Convene Special Term of Court to petitioner's counsel, the Honorables Jack Greenberg, James M. Nabrit, III, and Norman J. Chachkin, New York City, New York, J. LeVonne Chambers, Charlotte, North Carolina, and C. O. Pearson, Durham, North Carolina; to Respondent, Charlotte-Mecklenburg Board of Education; to the Honorable John N. Mitchell, Attorney General of the United States; and to the Attorneys General of each of the respective states of the United States, by mail, this_____day of August, 1970.

RONALD W. SABO
Assistant Attorney General

Of Counsel for the Applicants.